The Compleat Lawyer:

OR A

TREATISE

CONCERNING

TENURES & ESTATES

IN

Lands of Inheritance for Life, and other Hereditaments,

AND

Chattels Real and Perſonal.

AND

How any of them may be Conveyed in a Legal Form,

By Fine, Recovery, Deed or Word,

as the caſe ſhall require.

By *William Noy* of *Lincolns-Inne*, late Atturney-General to his Sacred Majeſty King *CHARLES* the Firſt.

Together with

Obſervations on the Authors Life.

London, Printed for and ſold by *John Amery*, at the *Peacock* over againſt *Fetter-Lane* in *Feetſtreet*, 1674.

Radcliffe Trustees

THE LIFE OF WILLIAM NOY.

IT hath been the approved practice of the best Historians, sometimes in short Characters, and sometimes in larger Descriptions, to represent the Nature, Sayings and Manners of those persons whose Actions, recited in the series of their History, have rendred them any way more illustrious and more conspicuous than others; to the great satisfaction of attentive Readers, who are naturally apt to enquire and know as much as they can of the persons whose actions have any way drawn their attention: and up-

on the same grounds usual to the Works of men eminent in the Common-wealth of Learning, to annex the Characters of the Authors, to give Authority to what they have said, from a due representation of what they have done, and to adorn their Books with their Lives; hanging their Picture before the Title-page.

The greatest commendation that can be given this Book, is its author; and the greatest Panegyrick upon the Author, is his Life; A Life that a healthy and strong Constitution promised eminent, and an indefatigable industry made so: begun in Cornwal, *(where there hath been nothing ordinary in either Divinity or Law, these sixty years) improved at* Lincolns-inne; *where an apprehension quick and clear, a judgement methodical and solid, a memory strong, a curiosity deep and searching, a temper patient and cautious, a correspondence well laid and constant, an ability to invent what is sought or propounded,*

pounded, to judge what is invented, to retain what is judged, and to deliver over what is retained; together with an honest bluntishness, as far from Court insinuation, as a Courtly carriage raised him to a reputation equal to his merit.

His Invention sifted Cases throughly; understood its place in Law with its petty circumstances, and was able to reply to an Adversaries unexpected Objections: to understand his Clients Cause at first opening; to see the drift of his adversaries reasons at first urging. Neither did his Wit prejudice his Memory; nor the great heat required to the one, consume the moisture which serveth the other; his Figures, Idea's and Notions being numerous indeed, but orderly: nor both, his Discerning faculty, which brought that knowedge that lyeth in Books at Gold doth in Mines, to the Fire and Crucible; to the improvement whereof, nothing conduced more, than his Slowness of belief, and Di-

ſtruſt, the Sinews of Wiſdom, which led him beyond modern Reports *and* Abridgements, *beyond late Tracts and Preſidents, beyond partial Explanations and Commentaries, to ancient Cuſtoms and Uſages, untrod Hiſtories, authentick Records, indiſputable Maxims and Principles: in all which, his pains verified his Anagram,*

WILLIAM NOY.
I MOYL IN LAW.

Having but one great impediment in the way of his preferment, viz. *Taciturnity and Penſiveneſs, which (how melancholick ſoever a man is) is always diſpleaſing, and commonly ſuſpicious; a ſullen aſpect in the face, intimating a more ſullen humour in the mind: crabbed looks, and melancholick humours, looſing thoſe kindneſſes which a pleaſant converſe, continual applications and gentileneſſes gain, being attended with that temperament of language, and way of moderating our diſcourſe, called* Φιλία, *whereby*

whereby we manage our converſation with all that affability, courteſie, and obliging deportment, that may beſpeak us chearful without ſullenneſs, and grave without auſterity; owning nothing that carrieth with it either neglect, indecency, or exceſſive freedome. An affected diſreſpect ſeldom proſpereth; it obliging not ſo much by its ſincerity, as it provokes by its ill example, and that diminution it carrieth with it of other mens dignity.

He was (ſay the Hiſtorians of his time) a man paſſing humorous, but very honeſt; clowniſh, but knowing: a moſt indefatigable plotter and ſearcher of ancient Records: whereby he became an eminent inſtrument both of Good and Evil (and of which moſt, is a great queſtion) to the Kings Prerogative. For during the times that Parliaments werë frequent, he appeared a ſtrut Patriot for the Common-wealth; and in the laſt, was an active opponent in the differences concerning Tunnage and Poundage: but when the diſſolu-

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tion of that, was in ſome mens apprehenſions the end of all; no ſooner did the King ſhew him the Lure of Advancement, but quitting all his former inclinations, he wheeled about to the Prerogative, and made amends, with his future ſervice, for all his former diſobligements. The diſingenuity of the Parliament, and his impendent neceſſity, would have put another Soveraign on extraordinary ways: but to King Charles *it was enough, they were illegal. No extremity, though never ſo fatal, could provoke him to irregularities: yet whatever ways the Laws allowed, or Prerogative claimed, to ſecure a deſperate people that would undo themſelves, he was willing to hearken to: therefore for a cunning man, the cunningeſt at ſuch a Project of any within his three Dominions, he ſends for his Attorney-General* Noy, *and tells him what he had in contemplation; bids him contrive the mode, (but a Statutable one,) for defraying the expence. Away goes the ſubtile Engineer*

neer, and at length, from old Records, bolts out an ancient preſident of raiſing a Tax for ſetting out a Navy in caſe of danger. The King glad of the diſcovery, as Treaſure-trove, preſently iſſued out Writs, firſt to the Port-Towns within the Realm, declaring the ſafety of the Kingdome was in danger, (and ſo it was indeed) and therefore that they ſhould provide againſt a day prefixed twenty ſeven Ships of ſo many Tun, with Guns, Gun-powder, Tackle, and all other things neceſſary. But this buſineſs is no ſooner ripened, then the Author of it dyeth, Aug. 6. 1634.

Much to his advantage is that Character Archbiſhop Laud *gives him*; That he was the beſt friend the Church ever had of a Lay-man, ſince it needed any ſuch: *And indeed he was very vigilant over its adverſaries; witneſs his early foreſight of the danger, and induſtrious proſecution of the illegality of the deſign of buying Impropriations, ſet up by perſons*

not

not well affected to the preſent Conſtitution :) And that of the Hiſtorian, That he loved to hear Dr. *Preſton* preach, becauſe he ſpake ſo ſolidly, as if he knew Gods Will. *To which I add a paſſage, from the mouth of one preſent thereat. The Goldſmiths of* London *had (and in due time may have) a cuſtom once a year to weigh Gold in the* Star-Chamber, *in the preſence of the Privy Council and the Kings Atturney. This ſolemn Weighing, by a word of Art they call the* Pix; *and make uſe of ſo exact Scales therein, that the Maſter of the Company affirmed that they would turn with the two hundredth part of a Grain.* I ſhould be loth (*ſaid the Atturney* Noy, *ſtanding by*) that all my Actions ſhould be weighed in thoſe Scales: *With whom all men concur, that know themſelves.*

And this was the firſt evidence of his parts, and the occaſion of his reputation. Three Graſiers at a Fayr had left their money with their Hoſteſs, while

while they went to market: one of them calls for the money, and runs away: the other two come upon the woman, and ſue her for delivering that which ſhe had received from the three, before the three came and demanded it. The Cauſe went againſt the Woman, and Judgement was ready to be pronounced; when Mr. Noy, *being a ſtranger, wiſheth her to give him a Fee, becauſe he could not plead elſe: and then moves in Arreſt of Judgement, That he was retained by the Defendant, and that the Caſe was this: The Defendant had received the money of the three together, and confeſſeth was not to deliver it until the ſame three demanded it; and therefore the money is ready, Let the three men come, and it ſhall be paid. A Motion which altered the whole proceeding. Of which when I hear ſome ſay it was obvious, I remember that when* Columbus *had diſcovered* America, *every one ſaid it was eaſie: and he one day told a company*

company at a Table where he was, that he could do a ſtranger thing than that diſcovery; he would make an egg ſtand an end on a plain Table. The ſpeculatives were at a loſs how it ſhould be done: he knocks the egg upon the end, and it ſtands. Oh! was that all? they cried. Yes (ſaid he) this is all: and you ſee how hard a thing it is to receive a thing in the Idea, which it's nothing to apprehend in the performance.

He never pleaded that Cauſe, wherein his Tongue muſt be confuted by his Conſcience. A Spaniſh Souldier would as ſoon take Pay againſt his King, as our Advocate againſt Truth: not only hearing, but examining his Client, and pinching his Cauſe where he found it foundred; and warranting only his own diligence. What others delayed, Mr. Noy *would bring to a ſpeedy iſſue; ſhooting fairly at the head of the Cauſe.*

His Name was quickly up, but his Industry not so quickly down; being none of those that pleaded not by his study, but his Credit: to confirm the old Sarcasm, That Physicians, like Beer, are best when they are old and stale; and Lawyers like Bread, when young and new.

He proceeded on this Maxime, That Rules of State and the Laws of the Realm mutually support each other: *looking on these who made the Laws to be not only desparate, but even opposite terms to Maxims of Government, as true friends neither to the laws nor Government.*

He would inculcate a Rule to this purpose: That every person engaging in familiarity with another, should throughly examine the design and ends upon which he and others enter thereon, and carefully enquire into his own condition and abilities, and impartially judge how much he doth contribute towards the uphold ing

holding of that amity; and accordingly as he finds himself to be of importance to his acquaintance, and subservient to the ends they have, in ambitioning his friendship, so far let him value himself, and expect to be valued.

The

The Compleat Lawyer:

OR,

A Treatiſe

CONCERNING

Tenures and Eſtates in Lands of Inheritance for Life, &c.

How were the multitudes of people at the firſt divided?

Into Families, Common-wealths, and Kingdoms.

To what end?

To live godly, peaceably and quietly together.

How is that performed?

By keeping the Law of God, which we call Religion; and by executing virtue, and puniſhing vice, by which vertue and good manners do ſpring.

What doth beſt uphold and maintain theſe things?

The Law.

How manifold is that?

Two-fold, *viz.* The Law of Nature, and the Law written.

What is the Law written?

It is either Divine or Civil.

What doth the Civil Law work?

A defence and encouragement to the good, and a bridling and puniſhment to the evil.

What elſe doth it work?

A ſecurity to the life of man, and quiet enjoying of *Meum* and *Tuum*.

How came in Meum and Tuum?

By the Law of *Jus gentium*, whereby right and property to Lands, Tenements, Goods and Chattels, are belonging to men.

How doth every Subject in England *claim and hold his Lands and Goods?*

By Eſtates in Law.

How many Eſtates in Law are there in Lands and Tenements?

Three, *viz.* Eſtates of Inheritance, Franktenement, and Chattels reals.

How are Eſtates of Inheritance divided?

Into Fee-Simple, and Fee-Tayl.

How are Fee-Simples divided?

Into

Into Fee-Simples absolute, and Fee-Simples Conditional.

What is an absolute Fee-Simple?

When Lands are given to me, and to my Heirs for ever.

What is a Fee-Simple Conditional?

When Lands are given to me, and to my Heirs for ever, upon condition I do such or such a thing, *&c.*

How are estates Tayl divided?

Into Tayls general and special, and into Tenant in tayl after possibility of issue extinct.

What is an intail general?

When Lands or Tenements are given to *I. S.* and to the heirs of his body lawfully begotten, or to be begotten.

What is an intail special?

When Lands or Tenements are given to a man, and to his wife, and to the heirs of their two bodies, between them lawfully begotten.

How is Tenant in tail after possibility of issue extinct?

When Lands are given to a man and his wife, and to the heirs of their two bodies between them lawfully begotten, if the man or wife dye without issue between them, the Survivor is Tenant in tail after possibility, *&c.*

Is ſuch a Tenant puniſhable of waſte or no?

No, he is not puniſhable of waſte; yet he may forfeit his Eſtate, by granting a greater Eſtate to another than he hath himſelf.

May other Tenants in tail forfeit their Eſtates?

No, unleſs they commit Treaſon.

How is franktenement divided?

Into four parts, *viz.* Tenant by Courteſie, Tenant in Dower, Tenant for his own life, and Tenant for anothers mans life.

How are Chattels divided?

Into Real and Perſonal.

What is a Chattel Real?

A term for years, the ward of lands, and tenant at will.

What are Chattels perſonal?

All manner of Goods, Corn, Cattel, Houſhold-ſtuff, and utenſils whatſoever.

How doth a Fee-Simple in Lands or Tenements paſs from one to another?

It may paſs by a Fine, or by deed, in raiſing of a uſe upon valuable conſiderations, or by Deed with Livery of ſeiſin, or by a Will in writing *ſealed* ſince the Statute of Wills, or by a Deed without Livery, inrolled within ſix Months after the date thereof, by the Statute in the 34 year of *H.* 8. and by a reverſion in fee by Attornment.

Bur

But of things incorporate, there can be no Actual Livery, but they paſs by grant in writing only, or by lineal deſcent.

May Tenant in Fee-Simple convey his lands and tenements from his wife and heir?

Yea that he may, to whom and by what Eſtate he will, except it be in *mortmain*, *contra Statutum* in the ſeventh of *Edward* the Firſt; and excepting ſuch right and Dower as his wife hath in the ſaid lands.

May he charge theſe Lands?

Yes, either by a yearly Rent with Clauſe of diſtreſs, which is called a Rent-charge, or by an Annuity, or by Statute; and alſo if he dye, theſe lands ſhall be aſſets to pay his debts.

Is there no forfeiture of theſe lands?

None, except he commit felony or treaſon.

May they any way eſcheat?

Yes, if the tenant dye without heir general or ſpecial, then the Lord of whom they are holden ſhall have the ſame by eſcheat.

What is the Law ſince the Statute in ſuch caſes?

If at this day there be Lord and Tenant in Fee-Simple by Chivalry and twenty pence rent, If the Tenant enteoff an Eſtranger of the ſaid Land, the Eſtranger

shall hold of the Lord by the said services and rents as the Tenant did hold, and the Feoffer or Seller shall be excluded, and be not meant at all.

What if the said Tenant maketh a Feoffment of the said land to another, without expressing to whose use?

Then it shall be to the use of the Feoffer and his heirs; except a valuable consideration be given for the land, then it shall be to the use of the Feoffees.

What if the Tenant since that statute doth enfeoff a stranger of part of the land?

Then the stranger shall hold of the Lord *per particular Morum, viz.* the Rent shall be apportionated.

As if there be twenty Acres of Land, and twenty shillings Rent, the Purchaser shall hold by three shillings Rent for three Acres.

But if there be an entire service, that cannot be apportionated; as a Horse, a Hawk, *&c.* the Lord shall have the whole.

What if the purchase be of the moyety of the whole land?

There shall be no apportionalment of the Rent, *&c.*

What if the Lord since that Statute purchase parcel of the tenancy?

By that purchase all the entire annual services

services be extinct; except it be for the profit of the Commonwealth, then it remaineth, otherwise it is extinct. For that purchase, read *Bruertons* Case in the sixth part *de Lo. Cook.*

What if the Lord purchase parcel of the land where the rents and services are apportionated?

Then the rents and services shall be apportionated.

Put a Case thereof.

If there be Lord and Tenant of six Acres of Land by six pence Rent, and suit of Court; if the Lord purchase two Acres, the Rent shall be apportionated; but otherwise if the Rent and Services be entire, as suit of Court, Homage, *&c.* Extinct.

What if these entire services come to the Lord of part of the land by the mere act of God, or of the Law?

Then the intire services shall remain to the Lord.

Put a Case of that.

If there be Lord and Tenant of four Acres of Land, by a Hawk, Homage, suit of Court, and Herriot; in this case, if one of these Acres descend to the Lord, the whole services remain.

But if the Lord had purchased the said

Acre, or releaſed to the Tenant the ſervices of the ſaid Acre, all the ſervices always are extinct.

Alſo in this caſe, if the Tenant doth enfeoff any Eſtranger of one of thoſe Acres, the Feoffee ſhall hold the whole ſervices.

But otherwiſe if the ſervices may be apportionated, as of Rent, Common or Proper, *&c.* And thereupon are great diverſities between Rent-ſervice and Rent-charge.

What apportionalment is there of Rent-charge?

Rent-charge is now at this day, as Rent-ſervice was before the Statute: That if the party that hath the Rent, purchaſe any part of the land charged, the whole Rent is extinct.

May a tenure be reſerved upon a gift in tail ſithence the ſaid Statute?

Yes; look how a Tenure may be created and reſerved upon lands and tenements in Fee-ſimple before the Statute, ſo it may be of lands given in the tail ſithence the ſaid Statute.

What if the Donor reſerveth no ſervice upon the gift in tail?

Then the Donee ſhall hold by ſuch ſervices as the Donor holdeth over.

How is this to be underſtood?

Where

Where the Reverſion in Fee-ſimple remaineth in the Donor.

What if the Reverſion be granted over?

Then the Grantee thereof ſhall hold his Reverſion of the chief Lord.

Is the King tyed by the Statute of Quis emptores terrarum?

No, the King is not ſubject to that Statute.

Upon what things may a tenure be reſerved?

Properly upon a Feoffment, or gift in Tail, in Lands or Tenements, and of Corporate things, into which may be an Entry or manual occupation.

Of what things may no tenure be reſerved?

Upon incorporate things, as Courts, Rents, Ways, Piſcaries, and ſuch-like.

Of what things in nature muſt the tenure be?

Of things which are either profitable to the Feoffer or Donor, or to the Commonwealth.

May the ſervice upon the tenure be reſerved to be done by an Eſtranger?

They cannot properly be ſo reſerved.

Can the tenant hold his land by two tenures?

No, one parcel of land cannot be holden by ſeveral tenures.

What

What tenure and service may be reserved upon an Estate of Franktenement?

Commonly upon an Estate of franktenement nothing is reserved but Rent, and to that Rent fealty is incident by proper right.

What is Franktenement.

In Estate for ones life, or for another mans life.

How doth it pass?

Either by writing, or by parol: and upon the same generally, there must be a livery of seisin.

How many manner of Estates for life are there?

There are four: Tenant for his own life, for another Mans life, Tenant in Dower, and by Courtesie.

Have these like power as the other tenants have?

No, the said tenants for life, and tenants for years may not grant a greater estate to another of the said lands, then he hath himself; nor may not commit waste, nor charge nor incumber the said lands, longer than they have estate therein.

What do you call waste?

Waste is properly any thing that is done or committed in the said land to the disinheriting of the Leffor, or of him in the Reversion.

Who

Who ſhall puniſh waſte or forfeitures?

He that is next in reverſion or remainder in the ſaid land of an Eſtate of inheritance.

By what Law?

Tenant in Dower, and Tenant by the Courteſie, before the Statute of *Glocester*, and the reſt by Eſtatutes.

What call you a Reverſion or Remainder?

The eſtate that dependeth, and is to come in poſſeſſion after theſe particular Eſtates ended.

How doth a Reverſion paſs, ſithence there can be no livery of ſeiſin without licenſe of the Terretenant?

It doth paſs properly by Deed in writing, and Atturnment of the particular Tenant, or by Fine, &c.

How doth a Remainder paſs?

Always it beginneth with the particular Eſtate, and dependeth upon the ſame; otherwiſe it is commonly not good, unleſs it be by deviſe, or Will; and it muſt begin when the particular Eſtate endeth, or elſe it is nough.

Put me a caſe upon that point?

If a leaſe be made *I. S.* of certain lands for life, the Remainder thereof to the right heirs of *I. N.* this is a contingent Remainder:

der: for if *I. S.* dye in the life of *I.N.* the Reverſion thereof is void; otherwiſe if *I.N.* dye in the life of *I. S.* and hath an heir, then the Remainder is good.

What difference is there between a Reverſion and Remainder?

Great difference: The Reverſion is the remnant of the Eſtate that the Donor or Leaſor reſerveth in himſelf, and paſſeth not with the particular Eſtate.

But the Remainder always paſſeth with the particular Eſtate at the firſt Creation thereof; but being created, may paſs as a Reverſion without the particular Eſtate. Alſo he that cometh to lands by Remainder, cometh in as a Purchaſer, and ſhall not be in ward; but the other in Reverſion may be in ward.

What other Eſtates are there unmentioned?

There is Tenant by the Statutes Merchant of the Staple, Tenant by Elegit, Tenant for years, Tenant at will, and Tenant by ſufferance.

Doth an action of waſte lye againſt theſe Tenants?

No, but only againſt tenant for years; and he ſubject unto the like law as tenant for life is.

May an Eſtate of Remainder depend upon an Eſtate for years? Yes,

Yes, very well; and then if the Remainder be for one life or more, there must be livery of seisin made to the tenant for years at his first entry.

If Tenant for years dye, who shall have his term?

If he do not grant it in his life, nor devise it by his will, his Executors or Administrators shall have the same.

How may it pass?

Either by writing, or by parol; and it shall be assets to pay the owners debts, if he dye possessed thereof.

What do you call Assets?

There is assets intermains, which is goods and chattels of the Defendant; and there is assets *per discent*, which is land in Fee-simple: and both these shall be lyable to pay debts so far as they will go.

What do you mean by Devise or Will?

When Lands, Goods and Chattels are devised or given by the last Will and Testament of any.

May Lands be so given without license?

Yes they may, sithence the Statute of Wills, 32 H. 8.

How was the Law before that Statute?

No man before that Statute could give Lands or Tenements by his Will in writing,

ting, to make an Eſtate of Franktenement or upwards, unleſs the ſame were in uſe, *viz.* in the hands of the Feoffees.

How is the Law ſithence that Statute?

Sithence that Statute a man may deviſe all his lands in ſoccage, and two parts of his lands holden in Knights ſervice.

Why may he not deviſe the other third part?

Becauſe it ought to deſcend, that the Lord be not defrauded of his Tenure, *viz.* Ward, Marriage, *&c.*

How be Wills made?

Either in writing, or elſe without writing, and then it is a *Nuncupative* Will; but no Eſtate in Lands for life or upwards will paſs by a Will *Nuncupative*, which is without writing.

What general learning is elſe of Wills?

The laſt Will is always of force, *Quia voluntas eſt ambulatoria, & non conſummatur uſque ad mortem Teſtatoris*; and then the intent of the Deviſor ſhall be much taken therein, as far as the words will extend.

What do you mean by the word Uſe?

I diſtinguiſh it thus, that before the Statute of 27 *H.* 8. one man might have the lands, and another the uſe of the ſame lands.

What did invent thoſe Uſes?

Two thing, *viz.* fear and fraud; fear in the

the time of war and troubles, and fraud to defeat the Lords of the Fee, and Creditors.

How many manner of Uſes are there?

Two, *viz.* in *Eſſe*, and to come in contingency.

How in Eſſe?

Either in poſſeſſion, or reverſion, or remainder.

How in Contingency?

Uſes which may come, and after be in poſſeſſion, reverſion, or remainder, if they be not cut off or barred.

What things are incident to thoſe Uſes?

Confidence in the perſons enfeoffed, and purity in eſtate.

Did they good or harm in common Law?

They did more harm than good; whereupon divers Statutes were enacted, as 10 *R.* 2. the 4 *H.* 4. 10 *H.* 7. the 11 *H.* 7. and 10 *R.* 3. were ordained, to ſuppreſs the miſchiefs that Uſes brought in.

Were thoſe miſchiefs remedied by thoſe Statutes?

No, they were not, until the Statute of 27 *H.* 8. by which Statute, uſes were transferred into poſſeſſion; ſo that now upon creating of an Uſe, it is preſently turned into Poſſeſſion, and the Feoffees are but conduit-pipes to lead the Uſes.

How

How was it before that Statute

Before that Statute he that had the poſſeſſion, *viz.* the Feoffee, might ſell the land from *Ceſtui que uſe*, and he had but his remedy in the Chancery.

Are there any uſes now in law?

Yes, but they are transferred *ipſo facto* into poſſeſſion, and hereupon the Feoffee is excluded.

Why are they uſed?

Properly to eſtate wives: for the Huſband cannot enfeoff or grant immediately to his wife, becauſe they are but one perſon in the Law.

How muſt ſuch an Eſtate be made?

The Husband muſt enfeoff two or three to the uſe of his wife for life, or otherwiſe.

Why muſt he enfeoff two at the leaſt?

Otherwiſe one feoffee hath ſuch an eſtate thereby, that his wife cannot have her Dower.

May not the Subject hold Lands of the King?

Yes, all the Lands of *England* are holden either mediately or immediately from the King as Lord Paramount.

How may they be holden of the King?

By Knights ſervice in Capite, by Soccage in Capite, by Knights ſervice won in Capite,

by

by Soccage won in Capite; by Grand Serjeanty, and by petty Serjeanty.

What differences is there in these Tenures?

Many great Differences. All Lands holden in *Capte* in Chivalry, do draw Ward, Marriage and Relief, *viz.* a Knights Fee is five pound, and so ratably; and it causeth all other Lands holden of measne Lords to be in Ward. Also the Tenant cannot grant these lands for life, or for any other higher Estate, without license of the King, nor his wife cannot marry without license; and if they do, they shall answer the King measne profits. And if a Tenant enter, and sell without license, he must pay for his license one years profit thereof. But to have a license before he enter, and sell, is but the third part of one years profit. Also the heir having been in Ward, when he cometh to full age, must sue livery, which will cost him one years profit. And if he be at full age at the death of his Ancestor, then he must have a primer seisin, which is of like charge.

What if it be holden in Soccage in Capite?

That draweth not Ward, *&c.* nor any other lands; and the Relief is one years Rent; but the Tenant must sue his livery or primer seisin of those Lands only.

What of Lands in Knights ſervice only?

That draweth only Ward, Marriage and Relief, only for that Land, in caſe of a common perſon, but that the King muſt have his prerogative without Priority or Poſteriority.

What do you mean by Priority?

That if a common perſon holdeth ſeveral Lands of two Lords by Knights ſervice, the eldeſt Tenure, *viz:* he that made the firſt Feoffment: which is not ſo in the Kings caſe.

How may one otherwiſe hold of the King?

He may hold by grand Serjeanty, and by petty Serjeanty.

How do they differ?

Grand Serjeanty is Knights ſervice and more, for the relief thereof is the value of the Land by year; and petty Serjeanty is Soccage in nature.

Put a Caſe thereof,

He that holdeth of the King to find a man to ſerve in the Wars by forty days at his own coſt, holdeth by grand Serjeanty. But he that is to find a Horſe, or ſuch a thing, to ſerve as aforeſaid, that is petty Serjeanty, becauſe it is not to be done by a mans body.

Alſo the Tenant may hold of the King,

or of a common perſon, by Eſcuage, Homage, Anceſt. Or by Homage, Fealty, and ſute of Court.

What is the meaning thereof?

Put me a caſe thereof.

Eſcuage uncertain is Knights ſervice, and Eſcuage certain is Soccage. Homage-Anceſtor is always between the Feoffer and Feoffee and their heirs; the other Homage is ſometimes joyned to Knights ſervice, and ſometimes to Soccage. And Fealty is always incident to all manner of Tenures and Eſtates.

Of what nature are theſe ſervices?

Some of them are valuable, and ſome not.

Upon what cauſe were they reſerved?

To keep a knowledge between the Lord and Tenant in lieu add recompence of the Land.

What remedy is there if the Tenant do not his ſervices?

The Lord may of common right diſtrain for them; and if the Tenant dye without heir general or ſpecial, or be attainted, the Lord ſhall have the Land by Eſcheat, as having no Tenant to do his ſervice. And thus much briefly of Eſtates, Tenures and Service.

Why hath the Lord the Ward of the body and lands of the heir, being not twenty one years of age?

Becauſe if the Land be given to the Tenant to do ſerviye of Chivalry, and when the Tenant dyeth, his heir being within age, for that ſuch a Tenant cannot do the ſervice, the Lord will have the body and land until he come to age.

When ſhall ſuch an heir be ſaid to be in Ward?

When the Father dyeth ſeiſed of Lands holden in Knights ſervice, and his heir being a ſon, and within the age of one and twenty years; and if it be a daughter, within the age of fourteen years, the Lord ſhall have the Ward until ſixteen years by the Statute-law.

Why if the father dye ſeiſed but of a Reverſion of the ſaid lands, an eſtate for life or years then being on foot?

The Heir ſhall be in Ward for his body.

Is it ſo, if the Father dye ſeiſed of a Remainder?

No, the heir there ſhall not be in ward, if the Tenant for life be living.

What other differences are there?

If Lands holden in Knights ſervice come to the heir by deſcent, he ſhall be in ward; but

but if it come by purchaſe, he ſhall not be in ward.

Put a Caſe thereof.

If the Father and Son purchaſe Lands, holden as aforeſaid, to them, and to the heirs of the Father, and the Father dyeth, the Son within age ſhall be ſaid to be in by purchaſe, and not by diſcent, and ſhall not be in ward. But by the Statute in the 30*th* of *Henry* 8. if it be holden by the King, he ſhall be in Ward.

When ſhall the heir be ſaid to be out of Ward?

If it be a Male, when he accompliſheth the age of twenty years; if it be a Female, ſhe muſt be full fourteen years at the death of her Anceſtor, otherwiſe the Lord will have her Ward untill ſhe be ſixteen by the Statute.

And alſo, if the heir being in Ward, and within age, be made a Knight, then he ſhall be out of Ward: But otherwiſe if he be made a Knight in the life of his Father.

What is the Lord to have by his Tenant when he cometh to full age?

He is to have the value of his Marriage, if he doth not take a Wife during his Nonage; and the double value of his Marriage, if he take a Wife during his Nonage; and

the double value of his Marriage, if he take a Wife during his Nonage, if the Lord tender him a Wife without diſparagement. But note that the firſt tender is not material.

How ſhall that value be tryed?

By a Jury, ſworn to try and value the ſame.

Shall the heir in Soccage within age be in Ward?

Yes, until he come unto the age of fourteen years, and then the Guardian is to account unto him for the profits of the ſaid Lands; and after the age of fourteen years, he is to take the profits of his Lands by his *Prochein amie.* But the Guardian in Chivalry is not ſo to do, but to have the Ward of Body and Land to his own uſe, until the age aforeſaid.

Who ought to have the Wardſhip of the heir in Soccage?

If his Lands do deſcend unto him by the Fathers ſide, his next Uncle or Friend on the Mothers ſide, to whom the Land may not deſcend: *Et ſic è converſo.*

What is the Relief of Lands in Soccage?

The value of one years Rent.

What if a man be diſſeiſed of his Lands and Tenements, or diſpoſſeſſed of his Goods and

and Chattels, what remedy hath he in Law?

His remedy is either to enter into the Lands and Tenements, if his Entry be congeable, as if there be no diſcontinuance nor deſcent caſt; or elſe to bring his Action, and ſo to recover the ſame by courſe of the Law; upon every which Action there is a proper and ſpecial Writ ordained.

How many manner of Actions are there?

There be Actions real, and Actions perſonal, and Actions mixt.

What do you call Actions real?

Some are Poſſeſſory, and ſome are Anceſter: the firſt being where the Plaintiff hath been ſeiſed, and is diſſeiſed; and the other where the Plaintiff was never ſeiſed, but ſome of his Anceſtors, whoſe next heir he is.

What ſhall the Plaintiff recover in real Actions?

In real Actions the Plaintiff ſhall recover the things in demand.

For whom and againſt whom do theſe Actions lye by law?

Always by, or againſt Tenant for life.

Shall the Plaintiff in theſe real Actions always recover Coſts and Damages?

In ſome of theſe Actions he ſhall, in ſome not.

How shall he know what Action doth lye properly for every demandant?

That is great learning, and a long discourse.

Let me somewhat understand it in general.

First you must note that there are some Writs only for Tenant in Fee-simple, as a Writ of Right, of *Ayel*, *Besajel*, *Cozenage*, *Nuper obiit*, and such like, as *Natura Brevium* will shew thee.

Also there are some Writs only for Tenant in Tail, and the Donor, as a *Formedon in Remainder*, *discender*, *and in reverter*.

The first for Tenant or Heir in Tail, the second for him in the Remainder, when there is no heir, and the intailed land ought to come unto him by his Remainder.

And for the Donor, when both the other do fail, and for want of Heir or Remainder, the land ought to revert or come back to the Donor.

And some other Writs do lye for Tenant for life, against Tenant for term of life, and the Writ of *Novel disseisin*, and all the Writs of Entry in degree as the cause lyeth, *viz.* That the Writ of Entry *sur Disseisin*, the Writ of Entry in the *Per*, *Cui*, and *Post*; and in all these, damages are to

be

be recovered, and not commonly in the former.

How are these and the former to be tryed?

The Writ of Right being the highest Writ in Nature, lyeth where all the rest fail, and is to be tryed by battel and grand Assize; and the issue is by joyning the mise upon the meer Right; and the rest are to be tryed by verdict of twelve men, unto which the parties may have their due Challenge.

What is the nature of Actions personals?

It is for the most part to recover Costs and Damages for the thing in demand, and are to be tryed by verdict as aforesaid.

Recite some of these Writs for Actions personal.

There are many, as a Writ of Trespass, of Debt, Accompt, Deceit, Detinue, Covenant, *&c. Vide Natura Brevium.*

How else do the real and personal Actions differ?

In real Actions, the Land must be summoned, and the view taken. But in personal Actions, the person of the Defendant must be summoned.

What are Actions mixt?

They are part in realty, and part in personalty.

Recite

Recite one thereof.

There is the Action of waſte, in which the place waſted ſhall be recovered, and treble damages.

How and by whom are theſe trials to be executed in Law?

They are executed two ways; either by Judges, *which ought to be twelve*, or by Jurors *Lay-men*, which ought to be twelve and Free-holders.

When by the Judges?

When the Counſel in Law of both ſides do demur in Law, that is, reſteth upon a meer point in Law, that ſhall be tryed by Judges.

When by a Jury?

When the ſaid Lawyers joyn upon an iſſue in *fait*, which muſt be tryed *juxta probatum & allegatum*, viz. By evidence and witneſſes.

Where ſhall the tryal in fait be?

In that County where the Jurors may take beſt notice of the matter; *Nam ibi ſemper debet fieri triatio, ubi Juratores meliorem poſſunt habere notitiam.*

How is that meant?

As when one is robbed in one County, and the goods are found in another County; or wounded in one County, and dieth in

in another County: sometimes the Counties shall joyn together if they may.

You have reasonably satisfied me in this matter, perceiving thereby that the law is the life and sinews of every Common-wealth: But what doth your law consist of?

It consisteth of a positive Law, of Custome, and of Statute.

What do you call the positive Law?

That which was the first Law, before Customs or Statutes did alter the same.

Shew me some example of your positive Law.

There is a positive Law in *England*, that a Descent doth toll an Entry; that between some Tenants the Survivor shall have the whole, if no Act be made to the contrary; that the eldest son shall inherit, and all the daughters by equal portions. *Et sic de cæteris.*

What do you call Custom?

Custom may be in Free-land or in Copyhold-land.

How in one, and how in the other?

By the Custom in certain Burroughs, which is called Burrough-English, the youngest son shall inherit. And in Gavelkind all the sons: *& sic de cæteris.*

And in Copyhold-land the words *sibi*

&

& ſuis. do create an Eſtate of Inheritance; and the wife of a Copyholder that dyeth ſeiſed of his Copyhold-Lands, ſhall have her free Bench during Widowhood.

How are the Cuſtoms maintained?

The Life of a Cuſtom is uſe and continuance, ſo that it be not altogether againſt reaſon.

What do you call your Statutes?

Acts and Laws, which are eſtabliſhed by Act of Parliament, *by the King, the aſſent of the Lords Spiritual and Temporal, and the Commons of the Realm.*

To what end are they made?

They are made generally either to abridge the power of the Common-law, or elſe to enlarge the ſame.

Was the Common-law defective before theſe Statutes?

No, not altogether defective; but the Law hath been by great wiſdom altered, or at leaſt increaſed, or abridged, according to the offences of the Subjects growing and increaſing from time to time.

Shew me ſome examples thereof.

At the Common-law, the counterfeiting of the Great Seal of this Realm was Felony, and now by Statute it is Treaſon. So the cutting of a purſe was but Treſpaſs, and

and afterwards the loſing of his thumb, and now Felony: and ſo of divers others things.

Have theſe Statute-laws amended or paired the Common-law?

Where it hath not altered the poſitive Law, but hath only increaſed or decreaſed the puniſhment thereof, it hath done great good; but where it hath altered the Common-law in ſubſtance, it hath done great harm.

Shew me an example where a Statute hath altered the Common-law.

Amongſt others, I will ſpeak only of the Statute of *Weſtmin.* the ſecond of *Entails.*

Did that Statute good or harm?

In my opinion, much more harm than good to the Common-wealth and Subjects.

Shew me ſome of the conveniences and inconveniences.

The firſt cauſe of that Statute was to continue Lands in the iſſue in tail, or in him in Remainder *ſecundum voluntatem Donatoris*, which now may be cut off by Fine and Recovery.

Secondly, if the Father dye far in debt, theſe lands will not be liable to pay his debts:

debts: and thus sometimes the Creditor is undone, and many times defrauded.

Thirdly, no man can take any good Estate from the Tenant in Tail contrary to the Statute of 2 *H.* 8. but he must be at the charges of a Fine and Recovery; whereby the Estates of poor men are defeated.

Fourthly, if the Father commit Felony, the son shall have the Land; which is an encouragement to evil.

All which as it standeth, in my opinion, hath brought more harm than good; as Purchasers defeated, Leases evicted, Estates and Grants upon good considerations avoided, Creditors defrauded, offendors emboldened, and divers other inconveniences.

I understand this, and the Law in the same sort in the rest. But how may Estates in tail be cut off contra voluntatem Donatoris? *and I will trouble them no more.*

Always the Donee in tail in possession, by a gift in tail by his Ancestors, by a Fine duly executed, may cut off that intail, and conclude parties and parties, *viz.* those who are parties to the same Fine, and their Heirs.

If it be with Remainder over to persons named in the Deed, then there needeth a Fine with Recovery to make it sure; yet the

the Fine is good as long as the firſt Donee hath iſſue living; and doth bind him in the remainder, if he maketh not his claim within five years after his Title accrued.

But by a Recovery with a Fine, it is barred preſently after the perfecting.

How muſt this Fine and Recovery be ſued out?

Firſt, there muſt be a Recognition of the Seller, which is the Cognizor, by *Dedimus poteſtatem*, or in the Common-Pleas before the Judges, to the Buyer called the Cognizee, of the nature and quantity of the land, and then finiſhed accordingly to make him Tenant of the land. Then take a *Præcipe quod reddat*, or a Writ of *Entry* in the *Poſt* muſt be brought by two ſtrangers againſt the ſaid Tenant, and he muſt vouch the Conizor, *viz.* the Tenant in Tail, and he muſt appear by Atturney or in perſon, and vouch the common voucher, and ſo the Tenant to hold in quiet poſſeſſion, and the Conizor or Tenant in tail to recover over ſo much land: and this recovery over (ſo purſued) is the reaſon of the Law, and called the double recovery.

What is the ſingle Recovery?

Such a *Præcipe* or Writ of Entry in the *Poſt* muſt be brought againſt the Tenant in tail,

tail, and he muſt vouch the common voucher, which muſt appear as aforeſaid, and confeſs the Warranty.

Why is this not ſo good as the other?

Becauſe it behoveth there the Tenant in tail to be ſeiſed of the eſtate tail at the time of the Recovery: for if he be ſeiſed of any other eſtate at the time of the Recovery; as if he firſt diſcontinue the tail, and ſo be ſeiſed of a Fee-ſimple at the time of the Recovery, then the Recovery is void.

Alſo a Collateral warranty from the Anceſtor of the Tenant in tail; which Anceſtor dying without iſſue, and the ſaid warranty deſcending upon the ſaid iſſue in tail, is a bar alſo of the tail, if he make not his claim in the life of his ſaid Anceſtor.

If the Remainder aforeſaid be in the King, ſhall the King be barred as aforeſaid?

This was ſomewhat doubtful before the Statute of 34 and 35 *Hen.* 8. But ſithence that Statute, it is no diſcontinuance of the tail, nor bar to the Tenant in tail, nor to the King in Remainder; yet the Law maketh a difference at this day, if the King give lands in tail, with the Remainder or

Re-

Reverſion in the King, a Fine or Recovery will not bar that entail.

But if a common perſon give lands in tail without a Reverſion or Remainder in the King, that entail may be cut off by a Fine and Recovery. And ſo the difference is, when the gift is from the King, and when from a mean perſon. And thus much generally of entailed lands.

I pray you put me ſome more differences between the Prerogative and Grant of the King, and of a mean perſon; and firſt touching his perſon.

Firſt, the Kings Majeſty hath two bodies, *viz.* a Natural and a Politick body.

Where and when hath he a Politick body?

For three cauſes, viz. *Cauſa Majeſtatis, neceſſitatis, & utilitatis.*

In the firſt, he cannot give, nor take, nor grant, but by matter of Record.

Secondly, to avoid *inter-Regnum* and Nonage, *&c.* that body cannot dye.

Thirdly, to take lands by deſcent; and in that caſe the half-bloud cannot hurt. *Vide Cook. Calvins* Caſe.

What is the meaning of all this?

That the King or Queen of *England* in

their politick bodies cannot be disabled, as by Death, Nonage, Marriage, or any such like, as a common person may be.

What of his natural body?

He may have Lands by descent, and purchase as a common person may do, by way of Remainder, or matter of Record.

What is his prerogative in Grants made unto him, and in Grants made by him?

It is a ground in Law, *quòd nemo potest plus juris ad alium transferrre quam in ipso est.* And further, nothing can pass from the King, nor for the most part to the King, but by matter of Record, *viz.* by Letters-Patents under the great Seal; and that the King cannot pass any thing by livery of Seisin, nor by matter in Fait; nor cannot disseise, nor be disseised.

Also it is a Maxime in Law, *quòd nullum tempus occurrit Regi*, that there shall be no Laches nor Estopples in the King for any Right or Title contrary to his express grant.

Then it seemeth that Grants made from the King be taken strictly?

Yes, the King must not be deceived in his Grant, and the thing must be named, and expresly set down; for things not named

named will not pass by this word Appurtenances; and the Grant shall not be taken strictly against the King, nor largest for the grantee, as in a common persons case.

What things in a common persons Case will pass by this word Appurtenances?

An Advowson Appendant, Common Appendant, or Appurtenant, and by reason of Vicinage, Ways, and such like.

What things may pass by the Grant of another thing, as incident thereunto?

Many things may pass by the grant of another thing, without special naming of the same.

As a Rent by the grant of the Reversion; by grant of a Mannor, the Hundred-Court or Leet, and the services; by a grant of a Fair, the Court of Pypowder, and many things else in the same nature.

Which be things corporate and incorporate?

Things corporate are whereof there may be an Actual possession, and Entry thereunto; as of a Mannor, a House, Lands, Tenements, and such like.

Which be things incorporate?

Things incorporate are Rents, Courts, Services, Common, and such like; and these

may be appendant, appurtenant, or belonging to corporate things, as Lands and such like.

What do you call Common?

It is the depasturing of one mans Cattel in the Lands of another man, in which the Commoner hath no Estate, but it is according to the nature of the Common claimed.

How many sorts of Commons are there?

Four: Common appendant, Appurtenant, in gross; and by reason of Vicinage.

How do they differ?

Many ways: Common Appendant and by reason of Vicinage cannot be but by prescription, time out of mind; but the other two may begin at this day.

Also Common Appendant belongeth properly to arable Land, or to Meadow or Pasture that was anciently arable Land; and it must be used with such Cattel as are levant and couchant upon the same Lands, *viz.* the same both in Summer and Winter; and with such Cattel as may hide and gain the Lands, *viz.* eat and muck the said Lands; and not with Hogs, Goats or Geese.

But if the Commoner purchase any part

part of that Land, or the Tenant ſell any part thereof, the Common ſhall be apportionated: But if the Commoner buy all the ſaid Lands by an equal Eſtate with the Commoner, the Common is drowned; and Common Appendant cannot be ſevered or granted from the Land; otherwiſe of Appurtenant. But if the Commoner Appurtenant purchaſe any part of that Land, the whole Common is extinct, becauſe it is againſt Common Right; and Common Appurtenant may belong to any, and for all manner of Cattel *ſans nombre*: ſo as the uſage and claim of either of theſe Commons ſheweth and declareth what manner of Common that is.

Common in groſs may be by grant or preſcription to have Common in another mans Lands with twelve Oxen, or twelve Kine, or leſs, to a certain number; and that may be granted over to another.

Common by Reaſon of Vicinage is, when two Seignories or Lordſhips, and the Tenants thereof, have uſed time out of mind to common together in their Common or Fields in the Fallow or Common time, by reaſon of their adjoyning,

and want of incloſure; and this Common is of the nature as Common Appendant, and the one Seignorie or Lordſhip may incloſe from the other, and drive or keep the ones Cattel out of the others Seignory or Lordſhip; but the one may not ſtaff-drive their Cattel into the others Seignory or Town-ſhip; and the one cannot have an Action of Treſpaſs againſt the other, if the ones Cattel wander, or voluntarily go and depaſture the others Seignory or Lordſhip.

Quære if the one may incloſe part of their ſaid Lands from the other, and leave part thereof for Common; *vide Tyrinhams* Caſe in *Cook.* Alſo none of theſe Commoners can have an Action of Treſpaſs againſt an Eſtranger which ſhall do Treſpaſs there, nor is to take his Common otherwiſe than with the mouth of his Cattel. *Quære* if the Commoner may trench the ground, to looſe out the water that hurteth the ſaid Land, Stat. 12. *H.* 1.

Make me I pray you better to underſtand briefly what Tenant in Dower is.

Dower is ſuch an Eſtate for the third foot during the Wifes life, in all ſuch Lands and Tenements as her Husband was at any time ſeiſed of an Eſtate of Inheritance during the coverture,

It

Is the wife to have a third during her life of all such Lands and Tenements?

No, he must be sole seised thereof, and not in joynt-tenancy.

Secondly, he must have the Franktenement, and the Inheritance of the said Land in the said Barony, *simul & semel*, during the Coverture.

And Thirdly, he must be seized of such an Estate in the Coverture, that the Child that he shall beget of the said Wife, may by possibility inherit the said Lands.

Of what age ought such a Wife to be at the death of her Husband?

Of the age of nine years.

May the Husband by his Act any way bar the Wife of her Dower?

Yes, in committing of Treason, but not of Felony, by the Statute in the first of *E.* 6. by Laches, Entry, Sute and Pleading.

May Tenants in Dower forfeit their Estate?

Yes, divers ways, as other Tenants for life may, and also by Elopment from her Husband in his life, without reconciliation.

May the Wife of him that holdeth Lands

of the King in Capite be endowed by the heir or any other common person?

No, she ought to come into the *Chancery*, and there make an Oath, that she will not marry without the Kings License: whereupon a Writ shall be directed to the Escheator to endow her.

May the wife have Dower and also Joynture of her husbands lands?

No, unless it be in especial Cases.

When may the wife be at her election?

If the Joynture be made during the Coverture, then at the decease of her Husband she may chuse the one or the other; but if it be made before the Coverture, then she must be tyed to her Joynture only.

Was it so at the Common-law?

No, but is now so by the Statute of 27 *H.* 8. *vide Vernons* Case in the fourth part of the Lord *Cooks* Reports.

Is Tenant in Dower punishable of waste?

Tenant in Dower and by the courtesie was punishable of waste by the Common-law, and the other particular Tenant by the Statute of *Marlebridge.*

How many ages of women are there to be observed in Law?

Eight:

Eight: First, seven years in aid *pur fil marrier*. Next, nine years to be endowed of her Husband, if her Husband be seven years of age or upwards at his death: ten years upon ravishment: twelve to consent to Marriage: full fourteen to be free from Ward, until the age of sixteen: seventeen to be an Executor: twenty and one to do all acts.

What do you call Tenant by the Courtesie?

It is when the Husband after the death of his Wife, is to have an Estate for life in the Lands of the Wife, and whereof she died seised of an Estate of Inheritance.

What Estate ought the Wife to have in the said Lands whereof the Husband may be Tenant by the Courtesie?

She ought to have such an Estate as the Husband is to have by whom she claimeth Dower as aforesaid. And besides, the Wife must thereof have a possession in *fait*, and not only in Law, except it be of an Advowson, or of a Rent: but otherwise in Dower.

What else is requisite to make him Tenant by the courtesie?

He must have a Child by his Wife during

during the Coverture, that is born alive.

May he forfeit his Eſtate?

Yes, as Tenant in Dower may.

May his wife hurt his Eſtate, or poſſibility of Eſtate?

Yes, if the Wife commit Felony before he is intituled to be Tenant by the Courteſie, *viz.* having no iſſue, he ſhall not be Tenant by the Courteſie: but otherwiſe after iſſue.

What other particular Eſtates are there?

There is Tenant by *Elegit*, Statute-Merchant of the Staple.

What is Tenant by Elegit.

It is the Creditor or Debtee that hath the moyety of all the Lands of the Debtor delivered unto him by way of Extent, with all the goods of the ſaid Debtor, until the Debt be levyed, by the Statute of *Weſtm.* the ſecond.

What is Tenant by Statute or Recognizance?

It is ſuch a creditor which hath all the Land and Tenements of the Debtor delivered unto him by Extent, until the ſaid Debts be paid by the yearly value thereof.

What if the Land extended grow better, and of more yearly profit?

Then the Debtor may have an *Audita querela*, and thereupon ſhorten the Extent and time of payment.

What if the Cognizee purchaſe part of the ſaid land?

If the Cognizee purchaſe any part of the ſaid Land after the Execution and Extent, the whole is diſcharged; but if it be before the Execution, and after the Statute acknowledged, it is a diſcharge for the other Feoffees of the ſaid Land. And alſo if the Cognizor purchaſe the ſaid Land of the Cognizee, an Extent may be ſued thereof.

What if divers ſtrangers be ſeverally enfeoffed of the ſaid Land, and an extent be ſued againſt one only?

He ſhall have an *Audita Querela* to have contribution of the reſt. But if the Cognizor reſerve any part upon ſuch a Feoffment, and an Extent be ſued only againſt him, he ſhall have a Contribution. *Quere* if his Heir ſhall have Contribution.

What difference is there between theſe Statutes and an Obligation?

Theſe Statutes bind the Land from the time of the acknowledgement, and maketh

it

it liable, in whose hands soever it be, to pay the Debts. But the Obligation bindeth not the Lands nor Goods, but from the time of the Judgement.

Doth a Writ of waste lye against such a Tenant?

No Action of waste lyeth against such a Tenant, but an Action of Accompt.

Besides these grounds of Law, and matters before rehearsed, what is the general learning of making and dissolving of Contracts?

First, it is a general learning, that there must be in every Contract, *quid pro quo*, *viz.* some valuable consideration between the parties, to be payed or performed, either presently, or at a day to come; or else some earnest to be given presently, otherwise the Contract is void: for *ex nudo pacto non oritur actio.* And some doubt whether a consideration past, do make a Contract good. Another learning is, that in an Action of Trespass, *quod actio personalis moritur cum persona*, and the Heir or Executor shall not be charged therewith.

You have reasonably satisfied me in general concerning Grants to men, and from men: Now shew me a little how such Contracts and

Grants may be discharged and avoided by the Law by parties consent; and I will make an end.

First, it is a general ground, *Quod nihil est tam conveniens naturali equitati, quam unumquodque dissolvi eo ligamine quo ligatur.*

What do you mean by that?

As there are matters of Record, and in *fait*, and some matters in *fait* by writing, and sometime by parol, the matter of Record generally must be defeated by the like matter, and the matter in writing by matter in writing, and not by parol, except it be in few Cases.

Put me a Case thereof.

If I enter into a Bond to pay six pounds at a day, I may plead payment thereof by parol and witnesses: but otherwise of a Bond without Condition.

Also every Lease or Estate of Franktenement or for years, may be drowned by taking an higher Estate in the same Land at any time after. Also these lesser Estates may be surrendred into greater Estates, and the lesser so drowned.

Put me a Case thereof.

A Lease is made to one for life, the Remainder to another for life, the Remain-

der

der to the third in tail: if he that hath the first Estate for life surrender to him in tail, or in fee, the surrender is void, because of the mean Estate for life.

How by Releases?

There it behoveth that he that Releaseth hath an Estate in *Esse*, at the time of the Release made; and that he to whom the Release is made, hath a Franktenement in the Land, or in *fait*.

Somewhat let me understand the nature of Tythes, and what you call them?

It is commonly the tenth part of the yearly profits which the Lay-man pays to the Spiritual man out of his Lands, Tenements and Hereditaments.

How many manner of Tythes are there?

Three, *viz.* temporal, predial, and mixt.

When began these Tythes?

Abraham gave the first Tythes to *Melchisedek*.

Did Abraham *then give the tenth of his increase?*

Many doubt whether it was more or less.

May the Spiritual man take all those Tythes without delivery?

No,

No, although they be ſevered the ninth from the tenth, but muſt be ſet out by the Lay-man: for *Melchiſedeck* did not take his Tythes, but *Abraham* gave his Tythes.

What remedy had the Spiritual man, if the Lay-man would not give his Tythes?

He had no remedy before the Statute in 2 *E.* 6. but to ſue for the ſame in the ſpiritual Court: for by that Statute trebble damages are given to the ſpiritual man, upon wrongful detaining or taking away the ſaid Tythes.

Who may preſcribe to have Tythes, or not to pay Tithes?

No Lay-man, except the King or the Patron, ought to have Tythes in their own right, or preſcribe to pay Tythes. *Vide Cooke le ſecond part del Report, Ca. Leveſque de Wincheſter.*

Are Tythes always to be payed proprio genere?

No Lay-man can preſcribe in *non Decimando*, but in *modo Decimandi.*

Of what things are Tythes properly to be payed?

Out of ſuch things as do increaſe, and bring a yearly profit; as of Corn, Graſs, Wood, Cattel, *Silva cedua*, Wool, Calves, and ſuch like.

What

What Tythes are to be paid in cutting down of great Trees?

None at all, becauſe it is a deſtruction of the flock: and ſo it ſeemeth of all wood above twenty years growth.

Where are theſe Tythes to be recovered?

If the right of Tythe be in queſtion, in the Spiritual Court; but if the Lay-man preſcribe *in modo Decimandi*, then upon the libel, he is to ſue a Prohibition, alledging his manner of Tything, and ſhall be tryed at the Common-law by a Jury: for the Spiritual Court will allow no ſuch plea, but in *proprio genere.*

To what Spiritual man is the Lay-man to pay his Tythes?

Moſt commonly to the Parſon or Vicar of the Pariſh.

What? was it always ſo?

No, before the Councel of *Lateran*, the Lay-man might have paid his Tythes to any Spiritual man whatſoever that would take cure of his Soul.

Are all paid this day to the Parſon or Vicar of the Pariſh?

No, ſome were given out to houſes of Religion, as to Abbies, Priories, Nunneries, Chaunteries, and ſuch like.

How happeth it that Lay men have, and enjoy Tithes, contrary to the Law?

That began upon Appropriations.

What mean you by that, Sir?

It is a Maxim in Law, That the Fee-ſimple as well of Tythes, as of all other Lands and Tenements, is ſuch in ſome perſon, as the Fee-ſimple of Tythes in the Ordinary, Patron or Incumbent; which three together may grant or charge the ſaid Tythes at their pleaſures.

What mean you be that?

I mean, that the Spirituality, heretofore abounding in Livings, were content with the Patron for gain or favour to grant a great part of the Tythes to any Lay-man.

What did they uſually grant?

Moſt commonly the Rectory or Parſonage, either in Fee-ſimple, or for a long term, and for a ſmall Rent.

How was the Cure then ſerved and diſcharged?

By that means a poor Vicaridge was hatched out of a great Parſonage; which Vicar in theſe days diſchargeth the Cure, and the Lay-man holdeth the reſidue of the Parſonage.

May such Leases be made at th day?

No, divers Statutes have abridge their power in such case, and especiall the Statute in 13 *Eliz.* So that they ca make no good Lease but for three lives, one and twenty years, according to th Statute.

Now lastly, a word or two concerning th quantity of Lands? and Tenements, and the special names and terms in Law, and of manner of Reliefs, &c. due for the same; an then I shall fully make an end.

First you must note, that two Fardels Land make a Nook of Land, and tw Nooks make half a Yard-Land, and tw half-Yards make a Yard of Land, and fou Yard-Lands make a Hide of Land, and fou (and some say eight Hides make a Knigh Fee,) the Relief whereof is 5 *l.* and ratably. And every Knights Living Revenue heretofore was, or ought to hav been 20 *l. per annum.* And the yearl Revenue of every Baron was, or ought t have been four hundred Marks. And th yearly Revenue of every Count or Ea 400 *l.* Whereas the Relief of a Baro was, and is 100 Marks, of an Earl Count 100 *l.* and of every Duke 800

So you may note, that the Knights Revenue at the firſt being 20 *l. per annum*, the Baron at the firſt was to have thirteen Knights Fees, and a quarter of a Fee, and the Earl or Count twenty Knights Fees, and the Dukes forty Knights Fees; by which proportion the Reliefs aforeſaid were rated as before is mentioned; which is the reaſon that Noblemen ought not to be arreſted or attached by their bodies, becauſe the Law doth preſume that they have ſufficient Lands and Tenements to diſcharge any Sute.

And they have theſe Dignities given them by the King for two purpoſes, *viz. ad conſulend. Regi tempore pacis, & ad defendend. Regem tempore belli*; in token whereof they are adorned with a Cap of Honour on their heads, and with a Sword by their ſides.

Alſo there is another relief due after the death of the Tenant that holdeth by Grand Serjeanty, and likewiſe after the death of the Tenant that holdeth in Soccage, whereof I have made mention before. And the Relief for Lands in Soccage is due to the Lord immediately after the deceaſe of the Tenant, of what age ſoever the heir is. But of the reſt, when the

Heir hath not been in Ward, and is of full age, at the death of his Anceſtor, ſuch a Relief is due preſently after the death of his ſaid Anceſtor, being Tenant of any ſuch Lands, or of any ſuch Eſtate, as before is mentioned. *Vale.*

Quicquid agas, prudenter agas, & reſpice finem.

Lex plus laudatur, quando ratione probatur.

A BRIEF TREATISE CONTAINING Tenures and Eſtates in Lands, &c.

Hereditaments and Chattels.

THe moſt part of all ſuch things which the Kings Majeſty or any of his Subjects doth or may enjoy, are, according to the terms uſed in the Laws of *England*, either Hereditaments or Chattels. We call ſuch things Hereditaments, which are Hereditary, and in a natural body may deſcend from Anceſtor to Heir, and from Heir to Heir for ever; or which in a body politick may ſucceſſively or otherwiſe have a perpetual continuance, as Honours, Meſſuages, Dignities, Priviledges, Liberties, and ſuch like. And to ſome purpoſe it maketh no matter what eſtate or intereſt

Hereditaments Natural and Political.

the party hath which enjoyeth any ſuch thing: for although he hath therein the baſeſt or meaneſt eſtate that may be, yet the name of an Hereditament in a thing enjoyed in a natural ſence remaineth, becauſe it is in his kind Hereditary, and an eſtate of Inheritance hath therein always his being in ſome perſon, except by ſome accident in ſome ſpecial caſe it happen to be for a time ſuſpended, or for ever extinguiſhed, as ſhall afterwards appear. And therefore he that hath but a term of years in Lands, granteth his intereſt in all the Hereditaments which he occupieth or enjoyeth, his intereſt in the Lands is thereby granted; but yet nevertheleſs, he that hath therein but a term for certain years, hath but a Chattel, and in regard thereof, in common ſence it loſeth the name of an Hereditament of that; in the moſt uſual and proper ſence it retaineth the name of an Hereditament only in ſuch perſon as hath therein an eſtate of Free-hold or Inheritance. And therefore if a man ſeiſed of certain Lands in Fee, and poſſeſſed alſo of all other Lands for term of years doth demiſe all his Hereditaments to another for certain years, the Lands, wherein the Leſſor had but a term, do not paſs thereby, no more than they

Grant the intereſt of all the Hereditaments which one occupieth and enjoyeth, doth grant Chattels for years alſo.

they ſhould paſs in the ſame caſe if the Leſſor had demiſed all his Tenements: and yet in a natural ſence Lands retain the name of a Tenement and Hereditament, as well in a Termor, as it doth in him that hath therein a Free-hold or Inheritance.

Alſo every Hereditament is either { Local. / Tranſitory, / or, / Mixt.

1. Local, as Meſſuages, which are vulgarly called Houſes or Lands, be they Arable, Meadow or Paſture, *&c.* *Local.*

2. Tranſitory, as Dignities, Priviledges, Liberties, Rents Services, and ſuch like. *Tranſitory.*

3. Mixt, as Honours, or Manners, which conſiſt of Meſſuages, Lands, Services, Priviledges, *&c.* *Mixt.*

Rectories or Parſonages, when they conſiſt of things Local and Tranſitory, as Land, and Tythes, and ſuch like. But a Rectory when it conſiſts only of Tythes (as ſome do) is a Tranſitory Hereditament: and the obſervation of this difference is very material in matter of Conveyance, as ſhall be hereafter declared. But it ſeemeth that ſuch things, whereof no Eſtate of Inheritance is, or ever was in being,

are not to be termed Hereditaments. Alſo if a man ſeized of Lands in Fee-ſimple, granteth out of the ſame a yearly Rent, or Common of paſture for life, or for years, this Rent or Common (as to me ſeemeth) is not properly any Hereditament; becauſe no Eſtate of Inheritance is, or ever was thereof in being. But if a man ſeiſed of Fee in lands, doth by ſufficient Conveyance in the Law demiſe the ſame to another for term of his life, and limiteth the Remainder thereof to the right heirs of a man that is living at the time of ſuch demiſe, no eſtate of Inheritance is thereof in being in any perſon whatſoever; for by the law the Eſtate of Inheritance paſſeth out of the Leſſor preſently; and yet it cannot be in ſuch heir to whom it is ſo limited, until the death of his Anceſtor: for until his death he can have no heir; but the perſon which is likely to be his next heir, is in the mean time only termed his heir apparent. Alſo if *I. S.* ſeiſed of a Rent in Fee, doth by a ſufficient Conveyance grant the ſame to another for life or for years, and after the ſame *I. S.* doth releaſe or grant the Rent unto him that is Tenant in Fee-ſimple of the land out of which it is iſſuing, and to his

his Heirs, in which caſe the Inheritance of the Rent is extinct in the Land; yet in a common and proper ſence, during the ſaid eſtate for life in the ſame, and in a natural ſence, during the ſaid eſtate for years, it retaineth the name of an Hereditament: For in both theſe caſes, an Eſtate of Inheritance in the thing demiſed or granted, had once his being, albeit by matter *Ex poſt facto* in the ſaid caſe of Remainder, it remaineth in ſuſpence and abeyance for a time, and in the other caſe extinguiſhed for ever. And in that which followeth, when I ſpeak generally of things Hereditary, or Hereditaments, I mean thereby Hereditaments according to the common ſence. Chattels are ſuch things as are not Hereditary, but Teſtamentary, as moveable goods, Leaſes for years, Wardſhip of Lands and Body, and ſuch like: And they are called Teſtamentary, as well becauſe by the courſe of the Common-Law, things only of that nature, and not Hereditaments, (as ſhall be hereafter declared) might be diſpoſed by Will and Teſtament; as alſo becauſe after the death of ſuch Teſtator, the Law doth transfer the ſame to the Executor of his

Diverſity.

his laſt Will and Teſtament, for the payment of his Debts and Legacies; for until a Statute made 32 *H.* 8. Hereditaments were not diſpoſable by Will, if the Teſtator had therein any greater Eſtate than for years, except ſuch uſe as is aforeſaid, and Hereditaments that were deviſable by Will, by a ſpecial Cuſtom, and not by the Common-Law. And the cauſe whereof an Eſtate of Inheritance of a uſe was Teſtamentary by the Common-Law, did ariſe of the ſame eſtimation which the Law then had thereof, being leſs than of a Chattel; for a Chattel was protected by Law againſt wrongs, but ſo was not a uſe apt remedy by Law, being for the one ordained, and not for the other. But it is to be noted, that albeit other Hereditaments were not Teſtamentary by the courſe of the Common-Law; yet by eſpecial cuſtom in ſome Cities and Burroughs, the Lands and Tenements therein ſcituate were always Teſtamentary, in regard of their own nature, as Chattels were; but *ſub modo* by a ſpecial cuſtom.

Real, or Perſonal.

Of Chattels, ſome are Real, and ſome are Perſonal: Chattels Real are properly ſuch as do ſavour of the Realty, (*viz.*) do conſiſt

conſiſt of ſuch things as are in their nature Hereditary, Wardſhips of Lands, or of other Hereditaments, Leaſes, or Intereſt for years, or at will, derived out of any thing whereof an Eſtate of Free-hold or Inheritance hath or had a being: Chattels perſonal are goods moveable, as Goods, Plate, Money, Oxen, Kine, *&c.* And hereby it appeareth that ſome Chattels perſonal are without life, and ſome living: But it is to be obſerved yet, that living Creatures *feræ naturæ*, as Deer., Conies, Hares, and ſuch like, are not Goods or Chattels, except they are made tame. Alſo Charters or Deeds of any Eſtate of Inheritance or Free-hold, albeit they be moveable, are not Chattels. Alſo Chattels Real, are either Local, Tranſitory, or Mixt, in ſuch caſes as is before obſerved of Hereditaments; for albeit they are termed Chattels, in regard of the Feebleneſs of their Eſtates, yet the things enjoyed by force of ſuch intereſts; are for the moſt part by nature Hereditaments; and of theſe differences in Chattels real, ſome profitable uſe may be made, as hereafter ſhall alſo appear. And it is to be noted, that ſome intereſts for years are derived neither from any Inheritance or Free-hold, but only from a mans perſon;

Without life or living.

Local. Tranſitory. Mixt.

perſon: As if a man doth by Deed create an Annuity for years, without limiting it to iſſue out of any Land or Tenement, the ſame is derived only from the perſon which granted it, who in his life-time, and his Executors or Adminiſtrators that repreſent his perſon after his death, ſhall be only charged therewith; and therefore, as well ſuch Intereſt in an Annuity, as alſo a Wardſhip of the Body of an Infant, which conſiſteth of a perſon, may in a ſtrained ſence be termed perſonal. But albeit the words *Guard. de Terre*, in the diviſion of Poſſeſſions, in the beginning of Mr. *Littleton*'s Tenures, do ſeem to imply, that Wardſhip of Body is not to be reckoned in the number of Chattels Real; yet it appeareth by other expreſs Books, that Wardſhip of Body is no leſs Real than the Wardſhip of Lands: And therefore ſuch implication as aforeſaid is no proof, that it is to be reckoned in the number of Chattels perſonal, otherwiſe than in a ſtrained ſence; for things Tranſitory, or Moveable, conſiſting of any Eſtate, (as Wardſhips conſiſting of a Term during the Minority of the Ward, or a term in an Annuity, Villein, *&c.*) are not properly called Chattels Perſonal, but Real. Furthermore, be-

cauſe

cauſe ſome things which may be enjoyed in form aforeſaid, are neither Hereditaments nor Chattels, it is therefore meet to conſider, in what general thoſe things are compriſed: And as to that, it is to be obſerved, that not only thoſe things which are neither Hereditaments nor Chattels, but alſo all Hereditaments whatſoever in every ſuch perſon that hath therein any greater eſtate than for years, are vouched under the general name of Free-hold, as in the Chapter next following it doth more at large appear.

Franktenement.

WHat is a Free-hold, and what is a Chattel, is very lively ſet forth in the beginning of *Littleton's Tenures*, by the ſaid figure of diviſion of Poſſeſſions: whereby it appeareth, that all manner of Eſtates of Inheritance, or for life, be they Eſtates according to the Common-Law, or according to the Cuſtom, are compriſed in the name of Franktenement; that is to ſay, every of them is aptly termed a Free-hold within Judgement of Law, is greater than any Eſtate for years, though it be made for many thouſand years, in regard of any probable

bable preſumption that Eſtate for life may be more perdurable than ſuch Eſtate for years: but in regard a Free-hold, which is proper as well to any Eſtate of Inheritance, as to an Eſtate for Life, in accompt of Law hath always been had in greater eſtimation than any Eſtate for years; and for this only cauſe a Term for years is ſubject to a forfeiture by an *Utlary* in a perſonal Action, for an offence wherein the offender is *felo de ſe*, and ſuch like; but no Eſtate of Free-hold, (unleſs it be by ſome ſpecial cuſtom) is ſubject to any forfeiture of that kind. The difference between a Franktenement and Chattels being ſo diſcovered as is aforeſaid, it ſeemeth fit to proceed to the conſideration of Eſtates. An Eſtate is that which in Latine we call *Status*; and it may aptly be thus defined, *viz.* An Eſtate is a permanent abode or continuance for a time or for ever, in a thing of ſuch nature, as either is, may, or might be Hereditary; as Mannors, Mills, Lands, Tenements, Rents, Services, Commons, Dignities, Liberties, Franchiſes, Priviledges, Offices, and ſuch like. But no Eſtate can be proper to Chattels perſonal: And for that cauſe, a gift thereof for a momentary time is of like force, as if it were

Felo de ſe forfeiteth all Chattels.

The definition of an Eſtate.

were given for ever. But it may be objected, that ſo it may be ſaid of a term for years in Lands or other Hereditaments, (that is to ſay) if ſuch a term be given or granted for an hour, it is of like force, as if it were given or granted for ever; yet ſuch term therein is properly called an Eſtate. To which Objection I anſwer, That although the Law be ſo in a grant of a term, which is as much as to ſay, his whole intereſt in the thing, wherein he is ſo intereſſed, (*viz.*) his Land, and not his term therein for one hour; the Grantee ſhall enjoy it no longer than for the time ſo limited, but otherwiſe it is of ſuch gift or grant of Chattels perſonal: but herein a difference is to be obſerved between ſuch a gift or grant of goods moveable, and a demiſe thereof; for although a Grantee for years of things properly deviſable doth enure as a demiſe or leaſe thereof, yet ſuch grant hath not the like operation in a thing deviſable; only in an unproper or borrowed ſence. *Difference.*

And therefore albeit a grant of goods moveable for a time, doth alter the property for ever; yet a demiſe thereof for a time ſhall only enure as a diſpoſition of the profits thereby ariſing, during that time. As for Example:

Example: If a flock of Sheep or Kine be letten for certain years, the Leſſee hath not thereby the general property thereof, but only a ſpecial intereſt or property therein, by force whereof he may take the profit thereof during the term; but ſuch intereſt therein is not properly an Eſtate. And albeit it be vulgarly called a Leaſe of ſuch Kine or Sheep, yet it is not ſo to be termed, otherwiſe than in a borrowed ſence: for if a man ſo intereſſed therein is likewiſe poſſeſſed of other Leaſes of Lands, and granteth all his Leaſes to another, his intereſt in theſe Chattels perſonal, or the profits thereof, will not paſs thereby. Of Eſtates, ſome are General, and ſome Particular, as hereafter appeareth.

1. General.
2. Particular.

General Eſtates.

A General Eſtate is that which we term an Eſtate in Fee-ſimple, which is the greateſt and largeſt Eſtate that may be; and it is divided by *Littleton* in his firſt Chapter of his firſt Book, according to the Etymology of the words Fee-ſimple, which in Latine are called *Feodum ſimplex, quia feodum idem eſt quod Hæreditas, & ſimplex idem eſt quod legitimum vel purum; &*

ſic

sic Feodum simplex idem est quod Hæreditas legitima vel Hæreditas pura; and it received the name of a general Estate, not only because it was the most common and usual of all other Estates; but also for that in regard of the ampleness thereof, it is exempted from the number of all particular Estates.

But yet it is further to be observed, that there be three kinds of Fee-simple: The first a Fee-simple without any other addition. The second a Fee-simple determinable. The third a base Fee-simple

The first of these is more general and common than any of the Residue, and it can never perish so long as the substance, whereof the Estate ariseth, hath any being. And therefore, albeit that he, which is seised of such Estate, happen to dye without heir, yet the same Estate is not extinguished but by Act in Law, in some other degree transferred to the Lord of whom the said Lands were holden, by way of Escheat; because the Land wherein the Tenant hath such Estate, doth still continue: but if a man seised in Fee of a Rent-charge, or Rent-seck, dyeth without Heir, this Fee-simple, although it be of the first sort, doth perish, because the Rent,

wherein he hath Estate, being transitory, is by such dying without Heir, quite swallowed up, and drowned in the Land out of which it did issue. And albeit a Fee-simple of this kind is sometimes absolute, sometimes conditional, yet the condition thereunto annexed, doth not alter the same in nature or kind, but only in the accidental quality.

Absolute. Conditional.

Secondly, a Fee-simple determinable, is such as may be determined by a special limitation before the effluxion of the time comprised in the general and proper limitation.

Thirdly, a base Fee-simple is, when two Fee-simples in one thing are in being at one time, the one being in nature more worthy than the other. In which case, that that is the least worthy, is called a base Fee-simple, because it is base in respect of the other.

There is a general Rule in the Law, that none can have an Estate lively, but the Donee; which is the party to whom it is given, or the Heirs of his Body. And it is further to be observed, that every Estate of Inheritance is either Fee-simple, or Fee-tail: of the one hath been sufficiently spoken for this time; for the other, some further

Every Estate of Inheritance is either Fee-simple or Fee-tail.

ther touch shall be given in the Chapter next following.

Particular Estates.

A Particular Estate is such as is derived from a general Estate by separation of one from the other; as if a man seised in Fee-simple of Lands or Tenements, doth thereof create by gift or grant an Estate tail, or by demise, a Lease for life, or any Estate for years, these are in the Donee or Lessee particular Estates in possession, derived and separated from the Fee-simple in the Donor or Lessor, in Reversion. Also if Lands be demised to *A.* and the Estate tail limited to *B.* these are particular Estates derived *ut supra*, and separated in interest from the Fee-simple in remainder given to *C.* albeit the same Remainder doth depend upon those particular Estates. And of particular Estates, some are Created by agreement between the parties, as the particular Estates before specified; and some by the Act of Law, as the State of Tenant entailed, *apres possibility d' issue extinct*, Estates by the Courtesie of *England*, Dower and Wardship. For albeit an Estate in dower be not compleat, until

it be aſſigned, which oftentimes is done by aſſent and agreement between parties; yet becauſe the party that ſo aſſigneth the ſame, is compellable ſo to do by courſe of Law, that Eſtate is alſo ſaid to be only created by Law. Alſo an Eſtate at will is a kind of particular Eſtate, but yet not ſuch as maketh any diviſion of the Eſtate of the Leſſor; for notwithſtanding ſuch Eſtate, the Leſſor is ſeiſed of the Lands in his demeaſne, as of Fee in Poſſeſſion, and not in Reverſion: Alſo an Eſtate at Will is not ſuch a particular Eſtate, whereupon Remainder may depend. But of all the States before-mentioned, many fruitful Rules and Obſervations are both generally and particularly ſo lively ſet forth by the ſaid Mr. *Littleton* in the 1, 2, 4, 5, 6, 7, and 8 Chapters of his firſt Book, which is extant as well in Engliſh, as in French; whereunto I refer you.

Poſſeſſion.

Two degrees of poſſeſſion: 1. Poſſeſſion in fait on, en ley. 2. Poſſeſſi-

IT is further to be obſerved, that all Eſtates that have their being, are in Poſſeſſion, Reverſion, Remainder, or in Right: but of all theſe, Poſſeſſion is the Principal, for that it is the full fruition of all the fruit

fruit of the Eſtate. There are two degrees of Poſſeſſion: The firſt and chiefeſt, Poſſeſſion in *fait*; the other, Poſſeſſion in Law. Poſſeſſion in *fait* or deed is ſuch as is before ſpoken of, and that is moſt proper to an Eſtate which is preſent and immediate; but ſuch Poſſeſſion of immediate Eſtate, if it be no greater than a term, doth operate and endure to make the like poſſeſſion of the Free-hold, or Reverſion. When a man is ſaid to have a term, it is to be intended a term of years; when it is ſaid, a man to have the Fee of Lands, it is alſo to be intended a Fee-ſimple. Poſſeſſion in Law, is that Poſſeſſion which the Law it ſelf caſteth upon a man before any entry or perancy of profits. As if there be a Father and Son, and the Father dyeth ſeiſed of Lands in Fee, and the ſame do deſcend to his Son as his next Heir; in this Caſe, before an Entry, the Son hath a Poſſeſſion in Law. So it is alſo for a Reverſion expectant, or a Remainder dependant upon a particular Eſtate for Life; in which Caſe, if Tenant for Life dye, he in Reverſion or Remainder before his Entry, hath all Poſſeſſion in Law. All manner of Poſſeſſions, that are not Poſſeſſions *en fait*, are only Poſſeſſions in Law; and it is to

be obſerved, That if a man have a greater Eſtate in Lands than for years, the proper phraſe of ſpeech is, that he is thereof ſeiſed; but if for years only, then he is thereof poſſeſſed: but yet nevertheleſs, the ſubſtantive Poſſeſſion is proper, as well to the one as the other.

Reverſion.

A Reverſion is properly an Eſtate which the Law reſerveth to the Donor, Grantor, Leſſor, or ſuch like, when he doth diſpoſe a Leaſe, or other Eſtate in Law, than that whereof he was ſeiſed at the time of ſuch diſpoſition. As if a man ſeiſed of Lands in Fee, doth give the ſame to another, and the Heirs of his Body; or if he do demiſe the ſame for Life or years, in this caſe the Law reverte in the Reverſion thereof in Fee to the Donor, or Leſſor, or his Heirs, becauſe he departed not with his whole Eſtate, but only with a particular Eſtate, which is leſs than his Eſtate in Fee: And ſuch Reverſion is ſaid to be expectant upon the particular Eſtate. Alſo, if he that is but a Tenant for Life of Land by deed or parol, giveth the ſame to *I. S.* in Tail, or for term of his Life, which is a

greater

greater Eſtate than he may lawfully diſpoſe; in this Caſe the Law reſerveth a Reverſion in Fee in ſuch Donor, though he were formerly but Tenant for Life. And the reaſon thereof is, for that by ſuch unlawful diſpoſition, which by deed or word cannot be without livery or ſeiſin, he doth by wrong pluck out the rightful Eſtate in Fee, that was thereof formerly ſeiſed in Reverſion or Remainder, and by force thereof, by a priority of time gained in an inſtant, he was ſeiſed of a Fee-ſimple at the time of the execution thereof. But if a man ſeiſed of Lands in Fee-ſimple, giveth the ſame unto *A.* and his heirs until *B.* do dy, without Heir of his Body; in this Caſe the Law reſerveth no Reverſion in the Donor, becauſe the ſtate ſo diſpoſed to *A.* is a Fee-ſimple; which though it be a Fee-ſimple determinable, is in nature ſo great as the State which the Donor had at the time of ſuch gift, and conſequently he departed thereby with all his Eſtate. And thereby an apparent difference is between a gift made to *A.* and the Heirs of his own Body, and a gift made to him and his Heirs until *B.* dye without Heir of his Body; for in the one caſe the Donee hath but an Eſtate Tail, in the o-

ther a Fee-ſimple determinable; *A.* hath a Poſſeſſion of Reverſion: for if *B.* dye without Heir of his Body, then whether *A.* be living or dead, the Land ſhall revert to the Donor. But ſuch poſſibility of Reverſion is much differing from the nature and property of a Reverſion; for he that hath but ſuch a poſſibility, hath no Eſtate, nor hath he power to give his poſſibility; but in the other caſe, the Donor hath Eſtate in Fee, and therefore he hath power to diſpoſe thereof at his pleaſure.

Remainder.

A Remainder is a Remnant of an Eſtate diſpoſed to another at the time of creation of ſuch Particular Eſtate whereupon it doth depend. As if *I. S.* ſeiſed of Lands in Fee, demiſeth the ſame to *B.* for Life, the Remainder to *C.* and the Heirs of his Body, the Remainder to D. and his Heirs; in this caſe *B.* hath a particular Eſtate for Life, and the Remnant of the Eſtate of the Leſſor is then alſo diſpoſed to *C.* and *D.* *ut ſuprà*, whereby *B.* hath an Eſtate for life, *C.* a Remainder in Tail, and *D.* a Remainder in Fee, depending in order upon

upon the particular Eſtate in Poſſeſſion: and in every Remainder five things are requiſite.

Five things required in a Remainder.

1. That it depend on ſome particular Eſtate.

2. That it paſs out of the Donor, Grantor, or Leſſor, at the time of Creation of the particular Eſtate, whereupon it muſt depend.

3. That it veſt during the particular Eſtate, or at the inſtant time of the determination thereof.

4. That when the particular Eſtate is created, there be a remnant of an Eſtate left in the Donor, to be given by way of Remainder.

5. That the perſon or body to whom the Remainder is limited, be either capable at the time of the limitation thereof, or elſe *Potentia propinqua*, to be thereof capable during the particular Eſtate. If Lands be given to *I. S.* and his Heirs, the Remainder for default of ſuch Heir to *I. D.* and his Heirs, that Remainder is void, becauſe it doth not depend upon any particular Eſtate. But if Lands be given to *I. D.* and his Heirs during the Life of *I. N.* the Remainder to *I. B.* this Remainder is good

Reaſon.

No Remainder can depend upon a Fee-simple, but upon a particular Estate descendable.

good, for it is not limited to depend upon a Fee-simple, but upon a particular Estate, which is only called an Estate for Life of *I. B.* descendable. If Lands be given to *B.* for twelve years, if *C.* do so long live, the Remainder after the death of *C.* to *D.* in Fee, the Remainder is void: for in that case it cannot pass out of the *Leor. al temps dl Creation dl perticuler estate pr. ans.* But if a Lease be made to *B.* for Life, the Remainder to the Heirs of *C*, who is then living, this Remainder is good upon a contingencie, that if *C.* dye in the Life of *B.* For this Remainder may well pass out of the Lessor presently in abeyance, without any inconvenience, because only the Inheritance is separated from the Free-hold as in abeyance.

Nota.

Reason.

If Lands be given for Life with a Remainder to the right Heirs of *I. S.* and the Tenant for Life dyeth in the life of *I. S.* this Remainder is void, because it did not vest or settle either during the particular Estate, or at the time of the determination thereof; for until *I. S.* dye, no person is thereof capable by the name of his Heirs; but if Lands be given to *I. S.* for term of his Life, the Remainder to his right Heir in the singular number, and the heirs of his Body

Body; and after *I. S.* hath iſſue a Son, and dyeth, this is a good Remainder, & the Son hath thereby an Eſtate tail: for although it were unpoſſible that ſuch Remainder ſhould veſt during the particular Eſtate, becauſe during his life none could be his Heir; yet it might veſt at the inſtant of his death, which was at the time of his determination of the particular Eſtate. Concerning a fourth thing; if a man ſeiſed of Lands in Fee, granteth out of the ſame Rent or Common of Paſture, or ſuch like thing, (which before the Grant had no being) to *I. S.* for term of his Life, the Remainder to *I. D.* in Fee, this Remainder is void; becauſe of this thing granted there was no Remainder in the Grantor to diſpoſe. And whereas ſome heretofore have been of opinion, that albeit the ſame can take no effect as a Remainder, yet it ſhall take effect as another Grant of a new Rent or Common, *ut res magis valeat quam pereat.*

There is a Rule of Law, That all things enjoyed in a ſuperior degree, ſhould not paſs under the name of a thing in an inferior degree: and therefore if Lands be given to two perſons, and unto the Heirs of one of them, or unto the Husband and Wife *A Maxim.*

Wife, and the Heirs of the Husband, and he that hath the Eſtate of Inheritance granteth the Reverſion of the ſame Land to another in Fee, ſuch Grant is void, *Reaſon.* becauſe the Grantor thereof was ſeiſed in a ſuperior degree, *viz.* in Poſſeſſion, and not in Reverſion, as appeareth 12 *Edw.* 4. 12 and 13 *Edw.* 3. *Brook, Title of Grants.* And concerning the fifth and laſt thing; if a Leaſe be made of Land for term of Life, the Remainder to the Mayor and Commonalty of *D.* whereas there is no ſuch Corporation then in being, this Remainder is merely void: albeit the King's Majeſty by his Letter-Patents do create ſuch Corporation during the particular Eſtate, at the time of ſuch Grant the Remainder was void, becauſe then there was no ſuch Body Corporate thereof capable, or in *Potentia propinqua* to be created, or made capable thereof, during the particular Eſtate; but the poſſibility thereof was then forrain, and not probably intended. The like law is, if a Remainder be limited to *Jo.* the Son of *T. H.* who had then no Son, and afterwards during the particular Eſtate, a Son is born who is named *John*, yet this Remainder is void; for at the time of ſuch Grant, it was not probably to

be

be intended that *T. H.* ſhould have any Son of that name. Alſo before the diſſolution of Abbies, if a Leaſe of Lands were made to *I. S.* for Life, the Remainder to one that then was a Monk, ſuch Remainder was void, for the cauſe before alledged, albeit he were deraigned during the particular Eſtate: but if ſuch Remainder had been limited to the firſt begotten Son of *I. S.* it had been good, and ſhould accordingly have veſted in ſuch Son afterwards born during the particular Eſtate.

Rights.

A twofold Right.

A Right in Law is either cloathed, or naked. A right cloathed is when it is wrapped in a Poſſeſſion, Reverſion, or Remainder. A naked Right, which is alſo moſt commonly called a Right, is when the ſame is ſeparated from the Poſſeſſion or Remainder, by diſſeiſin, diſcontinuance, or other deveſting and ſeparating of the Poſſeſſion from it. As for example, If a Leaſe of Land be made for Life to *I. S.* the Remainder to *I. D.* in Fee; in this caſe *I. S.* hath a Right cloathed with a Poſſeſſion, and *I. D.* cloathed with a Remainder: but if a ſtranger that hath no Right or Title, doth

doth in the ſame caſe enter into the Land by wrong, and put *I.S.* forth of Poſſeſſion, ſuch Entry by wrong is called a diſſeiſin; and therefore the Poſſeſſion is moved from the Right; for by reaſon thereof, the Diſſeiſor is ſeiſed of the Land, and *I. D.* hath alſo the like naked right to the Remainder by ſuch diſſeiſin, is likewiſe deveſted and plucked out of him, and cannot be reveſted in him during the Right of ſuch particular Eſtate, unleſs the poſſeſſion of the particular Tenant be therewith reveſted, which muſt be by his entry, or recovery by Action; and by ſueh entry of the particular Tenant, or by his recovery with execution, the Remainder ſhall be reveſted as well as to the Particular Eſtate. Alſo there is a Right in goods and Chattels, as well as in Lands, Tenements, and Hereditaments, which is alſo cloathed with a poſſeſſion, ſo long as the rightful proprietor hath the ſame; but if another doth take them from him by wrong, he now hath only a naked Right to the ſame, which cannot be by him granted, for the cauſe before alledged; but yet he may releaſe his Right therein to him that is thereof poſſeſſed, for the ſame reaſon as is before alledged of a releaſe of Right in Land;

Land: and if ſuch Right happen to be forfeited to the King, his Highneſs may grant the ſame by his Prerogative.

Common Recoveries.

A Common Recovery is ſuch as is ſuffered and Recovered by the aſſent of both parties to the ſame, of any Mannors, Lands, Tenements, Advowſons, Rents, Services, or other Hereditaments, for ſuch Eſtate thereof, and to ſuch uſe or uſes as are between them agreed upon; and it is moſt commonly ſuffered by the Writ of *Entry ſur diſſeiſin in le poſt*; the nature of which Writ is ſufficiently ſet forth by Juſtice *Fitz. Herb.* in his Book of *Natura Brevium*; albeit ſometimes it hath been, and may be alſo uſed in other Actions. And ſuch Common Recovery is uſual by ſingle, double or treble Voucher, as the cauſe doth require. And for the better underſtanding hereof, it is requiſite to obſerve the terms of Law uſed therein. The immediate party that recovereth, is called the Recoverer; and the party againſt whom the Recovery is had, is called the Recoveree: but in the proceeding therein, he that is to recover is called the Demandant, and

and the party againſt whom the immediate recovery is to be had, is called Tenant: for it is to be noted, that he muſt be Tenant of the Free-hold, or elſe the Recovery cannot be a good and ſufficient aſſurance in the Law. A Voucher is the calling into the Court of ſome other Perſon to warrant the Land; and he that firſt voucheth (*viz.*) he that calleth another to warranty, is the Tenant, and the party vouched termed the vouchee or Tenant by the warranty. And in a Recovery with a ſingle Voucher, are included two Recoveries, *viz.* one at the ſute of the Demandant againſt the Tenant, and another at the ſute of the Tenant againſt the Vouchee. And if it be with a double Voucher, there are included in it three Recoveries, one by the Demandant againſt the Tenant, one other by the Tenant againſt the Vouchee, and the third by the firſt Vouchee againſt the ſecond Vouchee. And in a Recovery with a treble Voucher, are included four Recoveries, whereof three are ſuch as are laſt mentioned, and a fourth is a Recovery by the ſecond Vouchee againſt the third; and in theſe Recoveries the Demandant hath Judgement to recover the Land againſt the Tenant, and the Tenant hath likewiſe

likewiſe Judgement to recover in value againſt the Vouchee; and if it be with a double Voucher, the firſt Voucher hath alſo the like Judgement to recover in value againſt the ſecond; and if it be with a treble Voucher, the ſecond Vouchee hath the like Judgement againſt the third. And the Record alſo maketh mention of the execution of the Judgement againſt the Tenant by Entry, or Writ of *Habere fac ſeiſinam* accordingly. And when ſuch Recovery, is ſo executed, the uſes agreed upon do forthwith ariſe out of the Lands, Tenements, *&c.* ſo recovered, according to the mutual agreement of the parties. The ſcope of a Common Recovery with a ſingle Voucher, is to bar the Tenant and his Heirs of ſuch only Eſtate tail which then is in him, to bar others of ſuch Eſtate as they have in any Reverſion expectant or Remainder dependant upon the ſame, and of all Leaſes and Incumbrances derived out of ſuch Reverſions or Remainders. The ſcope of a common Recovery with a double Voucher, is to bar the firſt Voucher and his Heirs of every ſuch Eſtate as at any time was in the ſame Voucher, or any of his Anceſtors whoſe Heir he is, of ſuch Eſtate; and all other perſons of

Recoveries with ſingle Voucher.

Recovery with double Voucher.

such right to a Reversion or Remainder, as were thereupon at any time expectant or dependant, and of all Leases, Charges, and Incumbrances derived out of any such Reversion or Remainder; and that will be also a perpetual bar of such Estate whereof the Tenant was then seised of in Reversion or Remainder, expectant, or dependant upon the same, &c. The scope of a Common Recovery with a treble Voucher, is to make a perpetual bar of the Estate of the Tenant, and of every such Estate of Inheritance as at any time had been in the first or second Vouchee, or any of them, or either of their Ancestors, whose Heirs he or they are, of such Estate, and as well of every Reversion thereon dependant, as also of all Leases, Estates, Charges, and Incumbrances derived out of any such Reversion or Remainder.

Recovery with treble Voucher.

The Law doth so protect the King's Possessions, that they cannot be devested or taken from him by any feigned Recovery Disseisin; and such protection thereof doth also support and preserve the Remote Reversion and Remainder pursuing the same, that they cannot be devested by a feigned Recovery suffered by Tenant in tail

tail in poſſeſſion, or by his Feoffment, or by any Diſſeiſin of the Free-hold; but yet ſuch Recovery will be ſufficient of the particular Eſtate tail, of the Recoveree or Vouchee, and of ſuch Reverſion thereupon dependant, as are in *Eſſe*, between his Eſtate and Remainder in the King, unleſs the Eſtate tail of the Recoveree or Vouchee were created by Letters-Patents of his Highneſs, or of ſome of his Progenitors, or by his, or ſome of their proviſion.

Fines.

A Common Recovery is an aſſurance of the greateſt force to bar ſuch Reverſions and Remainders as are aforeſaid in the precedent Chapter; ſo to another purpoſe, that is to ſay, to conclude ſtrangers of their right, if they do not make their claim according to the form of the Statutes in that behalf made, a Fine is before all other aſſurances to be preferred; and it receiveth the name of a Fine, *Quia finis finem legibus imponit.* In every Fine there are two ſeveral parties, the Commiſſor, and the Commiſſee: the party levying the Fine, is called the Commiſſor; and he

to whom it is levyed, is called the Commissee. A Fine is partly said to be levyed, when it is knowledged in the Court, or when it being knowledged elsewhere, is certified into the Court, and received to be there ingrossed and recorded. There are two sorts of Fines; the one at Common-Law, the other levyed and proclaimed according to the Statute. Two several Statutes are chiefly to be considered in Fines levyed, and proclaimed according to the form of a Statute; the one of them is the Statute of 1 *R.* 3. *chap.* 7. The other is the Statute of 4 *H.* 7. *chap.* 24. being in some things afterwards explained by a Statute made in *Anno* 32 *H.* 8. *chap.* 36. The number of these Proclamations are four, and to be made at four several Terms; and a Fine levyed and proclaimed in the King's Majesties Court, before his Justices of the Common Pleas, of any Lands or Hereditaments, is ordained to be a final end, and to conclude as well privies as strangers to the same, except such strangers as are women, Covert persons then being within age, *viz.* the age of 21 years, in prison, or out of this Realm, or not of whole mind, at the time of such Fine levyed. But this exception is con-

1 *R.* 3. *chap* 7. 4 *H* 7. *chap.* 24. 32 H. 8. *chap.* 36.

conditional, *viz.* that they or their Heirs, inheritable to the ſame Lands, *&c.* do take their Action or Lawful Entry according to their Right and Title, within five years next after they be of full age of 21 years, out of Priſon, uncovert, within this Realm, and of whole mind, and the ſame Actions ſue, or their lawful Entries take and purſue according to the Law. Concerning Fines with Proclamations, five things are to be obſerved. Firſt, the time of Levying and Proclaiming the ſame. Secondly, the place where, and before whom it is to be levyed. Thirdly, of what things it be levyed. Fourthly, what Ceremonies are therein to be obſerved. Fifthly, the ſeveral times are to be obſerved and conſidered. Firſt, that the Fine be levyed after the Feaſt of Eaſter, which was in the year of our Lord God 1496. For all Fines levyed before that time, are out of the compaſs of this Statute, 4 *H.* 7. as by the Letter of the ſame Statute it appeareth. 2. That the Proclamation muſt be made in time of the Term; and therefore, if any of thoſe Proclamations do happen to be made either before the beginning, or after the end of any Term, or on a Sunday, or other Feſtival day exempted

Five things are to be obſerved, concerning Fines with Proclamations.

4 H 7.

empted from the term; as on the Feaſt-day of the *Purification* of St. *Mary* the Virgin, *Aſcenſion-day*, *All Saints*, *All Souls*, or on the Feaſt-day of Saint *John Baptiſt*, if it happen on any other day than on the Fryday next after *Trinity-Sunday*, and to be recorded accordingly, then if it be not holpen by the Statute 23 *Eliz. cap.* 3. all the Proclamations are reverſable by a Writ of Error, or by Plea, as it appeareth in *Finches* Caſe, *Plow. Com.* 366, 267. and then the Fine will be of no other nature or force, than a Fine without Proclamations. And although in truth the Proclamations were all made within terms, according to the form of the Statute, yet if the Record or Records do purport the contrary, they are reverſable by error, or avoidable by Plea, if it be not holpen by the ſaid Statute; for a Record is of that credit in Law, that no Averment may be admitted to the contrary.

23 *Eliz. cap.* 3.

Plow. Com. 366, 267.

It is to be conſidered who are privies, and who are ſtrangers to a Fine: according to the Statute, there are three Privities only: 1. Privity in bloud only, 2. Privity in Eſtate (*tantum.*) 3. Privity in Bloud and Eſtate. There are three kinds of Privities: 1. In Bloud, *tantum.* 1. One

is

is when a man is Heir to his late Anceſtor, and yet hath nothing by deſcent from him. As for example: if a Father ſeiſed of Lands in Fee, doth thereof Infeoff a Stranger and his Heirs; or if he by his laſt Will and Teſtament in writing, did diſpoſe the ſame, being holden in Soccage, to another in Fee, and hath Iſſue, and dyeth; in ſuch caſe, ſuch Iſſue is privy in Bloud, having nothing by deſcent: 2. One other kind of privity in Bloud is, when ſomething is deſcended unto him, as Heir unto his Anceſtor, and yet he claimeth the ſame by ſome other Right, and not as Heir to ſuch Anceſtor. As for example: if there be a Father and Son, and the Son purchaſeth Lands of a Stranger in Fee, and is thereof diſſeiſed by his Father, who dyeth thereof ſeiſed, and the ſame deſcend to his Son as Heir; in this Caſe, the Son is privy alſo in Bloud, but not in Eſtate: for although the poſſeſſion of the ſame Land came to him by deſcent, as Heir to his Father, yet he was therein remitted forthwith to his former Eſtate. 3. And a third kind of privity in Bloud, *tantum*, is where a man in ſome reſpect is privy in Bloud and Eſtate, and in another reſpect privy in Bloud *tantum*. As

for Example: If there be two Brothers, and the Eldeſt purchaſeth Lands in Fee, and is thereof diſſeiſed by his younger Brother, afterwards diſſeiſed by a Stranger, and that Stranger dyeth thereof ſeiſed, the younger Brother being within age, and afterwards the Elder Brother dyeth without Iſſue, the younger Son hath two manner of Rights to the Land; the one is a Right of Entry againſt ſuch Heir as is in by deſcent during his Minority: but that Right is only in reſpect of his former poſſeſſion which he obtained by diſſeiſin, and not as Heir to his Brother; and in this reſpect he is privy in Bloud to his Eldeſt Brother, but not privy in Eſtate. The other Right that is now in the younger Brother, is only a Right in Action, and not a Right of Entry; and this is in him as Heir to his Brother, whoſe Entry was taken away by the ſaid deſcent: in reſpect of his Right, he is privy in Bloud and Eſtate to his Brother. Privity in Eſtate *tantum*, is where a man claimeth an Eſtate in Land, as Aſſignee to another; as if *A.* infeoff *B.* in this Caſe *B.* and his Heirs are privy in Eſtate to *A.* Privity in Bloud and in Eſtates are of two ſorts, whereof the one may properly be called a privity of

bloud

bloud and eſtate, the other is ſo called unproperly, and in a borrowed ſence. That which is properly called a privity in bloud and eſtate, is when both privities do accrew by deſcent, by or from one Anceſtor. The other is, when the one of them accreweth by one manner of Title, and the other by Title of another kind: As for Example: If there be a Father and a Son, and the Father purchaſeth Lands, and dyeth thereof ſeiſed, and the ſame doth deſcend to his Son, he is to his Father in a proper ſence privy in bloud and eſtate; becauſe both thoſe privities do to him accrew, by one deſcent from one Anceſtor.

It is to be noted, that ſuch privies as the Statute meaneth, are after the ingroſſing *de le fine & proclamation* made according to the form of the Statute, abſolutely barred without hope of Recovery or reſtraint, by any claim; but ſuch as are ſtrangers are barred only conditionally, if they or their Heirs do not claim according to the form of the Statute within the times therein preſcribed. It is a Rule in Law, That no errour in the fault of the Judge can be aſſigned to reverſe a Judgement, unleſs it be ſo apparent, that it may be tryed by view of the Record, or by inſpection

ſpection of the perſon: for if it ſhould, many Grave Judgements would be overthrown by corrupt Tryals of falſe ſurmiſes, to the ſubverſion of Juſtice, and maintainance of Vice. But if the Judge give judgement for the one party upon the matter appearing of Record, whereas he ought to give Judgement for the other party, this is reverſable by Error; becauſe ſuch a Fault of the Judge through ignorance of the Law, is apparent by the view of the Record. Alſo a Fine levyed by a Feme-covert is not erroneous, and therefore it is not reverſable by error, but avoidable by her. Alſo a Fine levyed by a feme-covert at the Common-law, is avoidable by the entry of the Husband; yet ſince a Fine levyed at this day, and Proclamation according to the form of the ſaid Statute of 4 *H.* 7. or 31 *Eliz.* cannot be avoided by the entry of the Husband of the Commiſſor, as to the Eſtate of Inheritance, but only to the Franktenement during the Coverture, and ſo long afterwards as he ſhall be Tenant by the courteſie, If he had iſſue by his ſaid Wife, before the Fine levyed. And in that caſe, albeit the Husband do enter within five years, or before Proclamations had and made

made, the Feme and her Heirs are barred as privies to the Fine, the words of the ſaid Statute of 4 *H.* 7. be, the Fine to be a final end, and conclude as well privies as ſtrangers: and yet all ſtrangers ſhall not be barred by ſuch Fine; the King is no ſuch ſtranger as is compriſed in the ſaid Act: for if the Law-makers had meant to conclude the King thereby of his Right, then it is not to be doubted (his Greatneſs being ſuch as it could not be forgotten) but they would have made ſome proviſion for his claim; which thing they have not done, becauſe they never intended to conclude him; but others, being bodies corporate of things that go by way of ſucceſſion, are compriſed in this Word (ſtrangers) in the body of the Act. And yet they are not contained in the letter of exception, or of any of the ſavings which do ſave rights to men and their Heirs, ſpeaking nothing of Corporations or Succeſſions, or of any thing in Succeſſion.

Livery twofold: 1 *en fait* 2 *in Law.*

There be two kinds of Liveries; the one called a livery *en fait*, which is a Ceremony uſed in the Execution of a Feoffment in Fee, or a Leaſe for Life, by delivery of the Ring of the Door of the Houſe, or a Clod of the Land contained in the Feoffment,

ment, in the name of the Houſe and other Hereditaments therein compriſed. The other is called a Livery in Law, or a Livery within the view, with the like ceremony in other form uſed in the execution of ſuch Feoffment or Leaſe *par vie*; but that is not alway made upon the Land, but only in the view thereof, that is to ſay, in a place where the parties do ſee and behold the Land; and the Feoffer ſo beholding the ſame, ſaith to the Feoffee, I make a Livery to you of this Land; according to the purport of the Deed (if it be a Feoffment by Deed) if it be without Deed, then the words are to this effect (*viz.*) I do deliver to you ſeiſin of this Land; or, I do make livery and ſeiſin of this Land to you and your Heirs; or if it be for term of life, To you for term of your life. This being done, the Feoffee or Leſſee muſt enter; and before ſuch entry, the livery within the view is not compleat; for if the Feoffor happen to dye before an entry made by the Feoffee, ſuch livery within the view is void, and cannot be good by any entry afterwards made.

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Conveyances and Assurances by Deed-poll, or by Parol.

A Conveyance or Assurance by Deed-poll, is when it is made by a single Deed which is not indented: and albeit many Conveyances may be by Indenture, which could not be good by Law, if they were made by Deed-poll, or by Parol; yet *è converso* all Conveyances and Assurances that may be sufficient by Deed-poll, or by Parol, may also without all question be good by Indenture. Also, what thing soever may be conveyed by Parol, may be also conveyed by Deed-poll; but *è converso*, many things may be conveyed by Deed-poll, which may not be conveyed by Parol. Therefore it seemeth fit now to consider what things in respect of their nature and kind may be conveyed by Deed-poll, and not by Parol; and as touching Hereditaments transitory, or things transitory, which do pass properly, or arise by Grant, not by Livery, Reversions, and Remainders expectant, or dependant upon a particular Estate in any Hereditaments whatsoever, may be apt Conveyance, pass, or be created by Deed-poll, but not by Parol; and

and hereupon ariseth the General Rule, that those things which do lye in Grant, and not in Livery, cannot pass by Parol, but by Deed. But such things as do lye in Livery, may pass without Deeds; Feoffments of Messuages, Lands, Houses, Mannors, or Rectories, and such like, are good without Deed; and so are Leases for years thereof made; because the Free-hold thereof will pass by Livery; otherwise it is of Grants of Seignories in gross Rents, Services, Commons, Advowsons, Wastes, Liberties, Franchises, and such like, being transitory, or of such Remainders or Reversions as are aforesaid. It is to be noted, that Lands, Tenements, or Hereditaments, or any Estate therein, or any Estate in a thing issuing thereof, cannot be conveyed to the King without matter of Record, as by Fine or Recovery, Record, as by Deed inrolled; and therefore a Grant, or any other Conveyance of such thing by Deed, is not sufficient, unless the same Deed be inrolled. And if a Lease of Land be made for life to *I. S.* the Remainder to *I. S.* in Fee-tail, the Remainder to the King in Fee, this Remainder to his Majesty cannot be good, unless the same be by Deed inrolled: But a Deed-poll thereof

inrolled

inrolled, will be no leſs ſufficient to this purpoſe than an Indenture inrolled. And to the inrolment thereof, the King is tyed to no time certain, ſo that an inrolment thereof at any time during his Majeſties life will be good in Law; but if it be not inrolled in his life-time, then nothing can thereby be in the King: and if the King grant the ſame to another before Inrolment, the Grant is void, and cannot be made good by the Inrolment thereof afterwards.

There are two ſorts of Conveyances by Deed. The one doth enure by tranſmutation of poſſeſſion, transferring of a naked right. Conveyances by Deed that do enure by way of Tranſmutation of Poſſeſſion, are of divers ſorts; whereof ſome do enure by way of removing of a poſſeſſion, and creating of an Eſtate, ſome by creating both of an Eſtate and Poſſeſſion; ſome by extinguiſhment; ſome by ſuſpenſion hereof; and ſome by remotion of the poſſeſſion, and drowning of the Eſtate. Conveyances by tranſmutation of a poſſeſſion that do enure by removing both of the Eſtate and Poſſeſſion, are ſuch whereby an Eſtate and Poſſeſſion formerly ſettled in the one party, are removed to the other party

A twofold Right.

party. Conveyances that do enure by removing of a possession, and creating of an Estate, are such whereby a possession formerly settled in one party, is removed to another, by Creation of a new Estate other than such as was in the party from whom it was divided. A Conveyance that doth enure by creation of an Estate and Possession, is when the thing conveyed had no being before the making of such conveyance. A Conveyance by transferring of a possession, is said to enure by way of Extinguishment, when the thing and the Estate conveyed are thereby extinguished. A Conveyance doth enure by remotion of the possession, and a drowning of the Estate, when a surrender is made of a particular Estate for life, or for years, to him that hath the Reversion or Remainder thereof; in which case the possession of the Land is removed, but the Estate is drowned; for he to whom the surrender is made, is not seised of the particular Estate, but of such Estate wherein the same is drowned; and such surrender of an Estate which might have been created without Deed, or matter of Record, may be surrendred by Parol.

Note, that a surrender to any person

of

of a particular Eſtate which could not be created without Deed, matter of Record, cannot be good by Parol.

Conveyances by Will.

A Conveyance by Will is commonly called a Deviſe: the party that giveth or bequeaths a thing by Will, is commonly called the Deviſor, and he to whom it is bequeathed the Deviſee. Of deviſes general there be three ſorts: 1. a deviſe by the Common-Law, 2. a deviſe by Cuſtom, 3. by force of the Statutes of 32 and 34 *H.* 8. By the Common-Law no manner of Hereditaments, wherein the Teſtator had any greater Eſtate than for years (except an Eſtate in a uſe of Lands or Tenements) was deviſable by Will; but he that had ſuch uſe in Fee, or for another mans life, might before the Statute 27 *H.*8. *de uſibus in poſſeſſionem transferendis*, have deviſed the ſame by Will, as he might do of a term in uſe. For the better diſcerning what deviſe is good by the Common-law, and what not, ſix things are meet to be obſerved: 1. That the Deviſor be a perſon able to deviſe: 2. That the Deviſee be capable of the thing deviſed:

3. That the things are deviſable by Law: 4. That the purport thereof being no other in effect, than ſuch as might ſtand good in Law, in a Conveyance by Act executed in the life of the Deviſor: 5. That the deviſe be not impoſſible: 6. That it be certain.

Concerning the firſt of theſe; foraſmuch as every Will doth take effect by the Death of the Teſtator, therefore without the Death of ſuch Teſtator, there can be no Will, and without a Will there can be no Deviſe; and conſequently all kind of Corporations are unable to deviſe any thing by Will, becauſe they never dye. A Mayor and Commonalty, Provoſt and Fellows of a Colledge, Wardens and Commonalty of a Company cannot deviſe any thing by Will; no more can a Biſhop, Dean, Parſon, or Vicar deviſe any thing deviſable, which they have not in their politick capacity, *(viz.)* which he hath in Right of his Biſhoprick, Deanry, Parſonage or Vicarage; but every of them may deviſe ſuch things deviſable as they have in their natural capacity; for in reſpect thereof every of them muſt die. But there are ſome natural perſons which have no power nor ability in Law to deviſe any

thing

thing by Will; as persons not of whole mind, and Ideots: But an Infant of fourteen years of age may make a Will, and thereby make an Executor of his Goods. The Husband may devise Goods or Chattels to the Wife, albeit they are one person in Law: A Woman-covert hath no power to give any Goods by Will; for without the consent of her Husband she cannot by Law make a Will, either of any of her Husbands Goods, or of such Chattels in possession, or in right of Action, as are in her Husband in his right, or her self in her right: 12 *H.* 7. *Fol.* 24. A man outlawed in a personal Action, or a person attainted of Felony or Treason, cannot devise any Chattels Personal or Real; for if it were devisable or grantable, the property thereof is in the King, as aforesaid, by such Outlary or Attainder.

Concerning the second thing to be observed; not only persons of full age, women sole, and persons of discretion and whole mind, but also Infants, Feme-coverts, Ideots, and Mad-men are capable of a Devise, because it tendeth to their benefit, and not to their prejudice; but yet such capacity of a Woman-covert, is subject to a condition in Law (*viz.*) if her

Husband do not diſagree to the ſame; for if at any time during the Coverture he doth diſagree thereunto, the Deviſe is void in Law, unleſs before ſuch diſagreement he did formerly agree to the ſame, but if he do once agree to it, his diſagreement afterwards is of no effect. Alſo perſons Outlawed in a perſonal Action, or convict or attainted of Felony or Treaſon, are capable of a Deviſe: but in ſuch caſe, if the Deviſe be of a Chattel, the King ſhall have the thing deviſed; as a Chattel forfeited by the Outlawry, Conviction or Attainder: and if the Deviſe be of an Eſtate in Free-hold, or Inheritance in Lands or Tenements, then in ſome caſe the King, and in ſome caſe the Lord of whom the ſame is holden, as the caſe may require, ſhall be intituled thereunto: Alſo a Deviſe made to a Child in his Mothers womb is good in Law.

Of the third obſervation, for the better diſcovering what thing is deviſable by the Common-law, and what not, a difference is to be obſerved, betwixt an Eſtate to the uſe of another created by Law, and an Eſtate made or conveyed to the uſe of another by agremeent of parties; for where it is created by Law to the uſe of another, there

there it is not deviſable by Will; but if it be made or conveyed by agreement, it is otherwiſe; as for Example: If a man ſeiſed in Fee of Lands holden in Soccage, hath iſſue a Son, and dyeth, the Son being under fourteen years of age; in this caſe the Law appointeth the care and cuſtody of ſuch Iſſue, and of the ſame Lands which came to him by deſcent from his Father unto his mother (if ſhe be living) as Guardian in Soccage, until he be of the age of diſcretion, *viz.* fourteen years: but this Wardſhip in Soccage, ſo to her accrewing by Law, is to the only uſe and profit of the Infant, and therefore it cannot be deviſable by Will, neither ſhall it go to the Executor or Adminiſtrator of the Mother after her Death, but to the next Anceſtor of the Infant of the Mothers ſide, as it appeareth, *Plowden* fol. 239 and 294. in the Caſe between *Osborn* and *Joye*.

Concerning the fourth, if *ceſtui que uſe* in Fee of Land before the ſaid Statute of 27 *H.* 8. had deviſed the ſame to *I. S.* and his Heirs, and for default of ſuch Heirs to remain to *I. D.* or if he had deviſed the ſame to *I. S.* and his Heirs, until *I. N.* do happen to dye without iſſue of his body,

the Remainder to *I. D.* and his Heirs, this Deviſe of ſuch Remainder had been void; becauſe by the Rules of Law, a Remainder could not be limited to depend upon an Eſtate in Fee-ſimple; ſo that ſuch a Remainder could not have been created by Conveyance executed in a mans life.

Concerning the fifth Obſervation; if a man be poſſeſſed of a term determinable by his Death, doth Deviſe the ſame by Will to another, the Deviſe is void, becauſe it is impoſſible that it ſhould take any effect. Alſo a Deviſe to *I.* the Son of *T. S.* of *D.* whereas the Son of *T. S.* hath only iſſue *W.* is void, becauſe there is no perſon in *rerum Natura.* So it is alſo, if a term be deviſed to the Executor of *I. D.* whereas *I. D.* dyed Inteſtate.

Concerning the ſixth Obſervation; if any having iſſue many Children, doth by Will give or bequeath a Cup of Silver, a Horſe, or any other thing deviſable, to one of his Sons, this Deviſe is void, becauſe it is uncertain which of his Sons ſhould have it; ſo it is alſo, if the like Deviſe be made disjunctively to *I. S.* or *I. D.* but a Deviſe to one of his Sons, at the choice

choice of his Executors, is good, becauſe the uncertainty may be reduced to a certainty by the Election of the Executors. So alſo if a man be poſſeſſed of a term in Lands for ſixty years, and by his Will Deviſe to *I. D.* ſuch and ſo many years of the ſaid term as ſhall be nominated or appointed by his Executors; this Deviſe is good, *cauſa qua ſupra:* and yet a Grant or Gift thereof in that form made by Conveyance, executed in his life, could not be good, the reaſon thereof is, becauſe he can have no Executors in his life-time, by reaſon whereof it is impoſſible to reduce ſuch Gift or Grant unto a certainty before his Death; and a Conveyance executed in a mans life muſt be reduced to a certainty before his death, or elſe it can be of no effect in Law. But that reaſon ceaſeth in a Deviſe (which taketh no effect until his Death) and therefore, the Law is therein differing accordingly. Alſo it is to be obſerved, that a Deviſe of Chattels may be good, either by Will nuncupative, or by writing.

Concerning a Uſe, it is to be obſerved, that a man ſeiſed of Lands or Tenements in Fee, to the uſe of him and his Heirs, could not by the Common-law Deviſe

the uſe thereof by Will, unleſs the ſame Lands or Tenements were deviſable by Cuſtom. But if *I. S.* ſeiſed of certain Lands in Fee, had infeoffed certain perſons thereof to the uſe of himſelf and his Heirs, this uſe ſo ſevered from the poſſeſſion, was deviſable by the Common-Law, albeit the Lands out of which it riſeth were not deviſable.

Conveyances by Will of Lands deviſable by Cuſtom.

IT is to be noted, that albeit by the Rule of the Common-Law, no Hereditaments (other than a Uſe) was deviſable by Will; yet by particular Cuſtoms in divers Cities and Burroughs, Lands and Tenements therein ſcituate have always been deviſable by Teſtament; ſo that the Cuſtom doth therein alter the courſe of the Common-Law. But in every ſuch Deviſe ſix things are eſpecially to be obſerved.

1. That the thing deviſed be compriſed within the Cuſtom.

2. That the Deviſe be purſuant to the Cuſtom.

3. That

3. That the power of the Deviſor be not reſtrained by Statute.

4. That the Cuſtom be lawful and reaſonable.

5. That the intent of the Deviſor be certain, lawful, and not unpoſſible.

6. That the Will be not countermanded.

Concerning the firſt of theſe, the obſervation is double:

1. That the thing deviſed be as well in nature and kind, as alſo in continuance, ſuch as is warranted by the Cuſtom.

2. That it be not contained within the bounds and limits thereof. As to the firſt part, if by Cuſtom all the Tenements within a certain City or Borough be deviſable by Will; a Rent-charge, and Rent-ſeck which had continuance time out of mind, are in nature, kind and continuance, ſuch as be compriſed within the Cuſtom, and therefore are by force of ſuch Cuſtom deviſable. As to the ſecond part of the Obſervation: if a man ſeiſed of Rent in Fee, which time out of memory hath had a continuance, the ſame Rent is iſſuing as well out of Lands within the limits of ſuch

ſuch Cuſtom, as aforeſaid, as alſo out of Lands not contained within the Precincts; this Rent is not deviſable by the ſaid Cuſtom, becauſe the ſame or any part thereof is not contained within the Precincts thereof, which muſt be taken ſtrictly.

The ſecond Obſervation hath three branches, one concerning the perſon deviſing, another touching the perſons to whom the Deviſe is made; and the third granteth the Deviſe it ſelf.

1. As to the firſt Branch, a Deviſe made by a Forraigner, to any perſon, of Lands or Tenements ſcituate within the City of *London*, ——— to the Cuſtom of *London*, as appeareth *M.* 8 and 9 *Eliz.* fol. 255. But yet ſome perſons compriſed within the general Cuſtom, are by the Rule of the Common-law exempt from the ſame; as a Deviſe made by a perſon Lunatick, an Ideot, an Infant, and a man ſeiſed only in the right of his Wife, is void, this Cuſtom notwithſtanding.

As to the ſecond Branch; Citizens and Free-men of *London*, may by the Cuſtom of the ſaid City, without the Kings Licenſe, lawfully deviſe Lands in *London*, whereof they are ſeiſed in Fee, to Guilds

or

or Corporations, as appeareth by 5 *H.* 7. 10, 19. But if he be only a Free-man and no Citizen, or only a Citizen and no Free-man, he cannot without the Kings ſpecial Licenſe lawfully deviſe in *Mortmain.*

As to the third Branch; if the Cuſtom be, that Lands and Tenements within a certain City be deviſable, in Fee-tail, for ſuch Eſtate, *Weſt.* 2. was a Fee-ſimple; alſo it ſeemeth probable, that by force of a Cuſtom that maketh Lands and Tenements deviſable, a man may deviſe thoſe things that are therein growing, as Trees, Graſs, and ſuch like. But if a deviſe of a Rent, or Common out of Lands deviſable, is not purſuant to the Cuſtom, becauſe they had no being at the time of the Deviſe; and though they had any beginning, yet they were created within the time of memory, they are not deviſable for the cauſe aforeſaid. If a Houſe be only erected upon deviſable Lands by Cuſtom, a Deviſe thereof is purſuant to the Cuſtom, albeit in that place there was never any Houſe before; becauſe the Houſe doth retain the nature of the Land whereupon it was built, as a principal part whereof it doth

doth conſiſt, the change of the name notwithſtanding.

Concerning the third Obſervation, it is to be noted, that albeit the Cuſtom hath been to deviſe Lands to any perſon or body politick, yet the ſame may not by force of ſuch Cuſtom be deviſed at this day in *Mortmain*, upon pain of forfeiture, according to divers Statutes, unleſs the Licenſe of the King, with the conſent of the Lords mediate and immediate, be firſt therein had and obtained; for ſuch Cuſtom is in that behalf qualified and reſtrained, upon the pain aforeſaid, by the Statute of *Mortmaine*, (viz.) *Magna Charta*. A Cuſtom that began only ſince the Statute, cannot be good; for every Cuſtom that may evidently appear to have his beginning ſince the time of *R.* 1. is void in Law, as appeareth by 33 *H.* 6. 27. 9 *H.* 6. and *Littleton* 38. yet nevertheleſs the cuſtoms to deviſe in *Mortmaine*, are not abrogated by any of the ſaid Statutes: for the Deviſe, or other form of Alienation in *Mortmain*, is not by any of the ſaid Statutes made void; but it is only in advantage of the Lords, who might ſuſtain loſs thereby, prohibited upon pain of ſuch forfeiture to them accrewing, as thereby appeareth

peareth; ſo that by Licenſe and conſent as aforeſaid, a Deviſe in *Mortmaine*, by force of a Cuſtom, may ſtand good in Law, without danger of the penalty of forfeiture.

Concerning the fourth Obſervation; if the Cuſtom be not lawful and reaſonable, it is void, ſo that a Deviſe by virtue thereof, cannot be of any force in Law. And therefore, if an Alien do purchaſe and deviſe Lands lying within a certain Borough by force of a Cuſtom, that Lands and Tenements within the ſame Borough are deviſable to Aliens in Fee to their own uſe, and by them deviſable by Teſtament, this Deviſe is void: for ſuch Cuſtom againſt the Kings Prerogative is unlawful; albeit his Highneſs cannot be thereunto entituled without Office or other matter of Record, yet mean between ſuch purchaſe and office found, &c. I take the Alien to be pernour of the profits, and that the Eſtate purchaſed is forthwith in conſideration of the ſame Lands, until the Kings Title do appear by Office or other matter of Record. Alſo it is to be obſerved, that a Cuſtom to deviſe a Right, ſeparated from the poſſeſſion, cannot be lawful, becauſe it ſavoureth of Maintenance.

nance. As touching unreaſonable Cuſtoms: If the Cuſtom within any City or Borough be, that Tenements therein ſcituate are deviſable by Infants, Ideots, or mad-men, it is unreaſonable, and therefore void. But a Cuſtom, that the ſame be deviſable by Children of fourteen years is good.

Concerning the fifth Obſervation; if the intent of the Deviſor be uncertain, unlawful, or impoſſible, the Deviſe will be of no force in Law. The intent of the Deviſor may be uncertain, either in the perſon to whom he doth deviſe, or in the thing deviſed, or in the Eſtate that ſhould paſs thereby. And firſt concerning the perſon, it appeareth 49 E. 3. 3. one *Jorden* did deviſe certain Tenements in *London* to one for Life, ſo that after his deceaſe the ſame ſhould remain unto two of the better ſort of the fraternity of *London*: this Remainder was agreed to be void for want of certainty, which perſons of the fraternity ſhould have the ſame. Secondly, as concerning the certainty in the thing deviſed; as for example, if a man ſeiſed of Lands or Tenements deviſable, doth by Will bequeath a portion thereof to *J. S.* this Deviſe is void, becauſe it doth

doth not appear what or how great a portion thereof the Deviſee ſhould have by force of the ſaid Will. 3. Albeit the intent of the Deviſor doth certainly appear, and the perſons to whom the deviſe is made, and in the Lands and Tenements deviſed; yet if the Eſtate therein limited be ſo uncertain, that neither by matter expreſſed, or implied in the Will, nor by a common intendment it cannot be reduced into a certainty, the Deviſe will be void in Law. And therefore, if a man ſeiſed of Lands deviſable as well by Will nuncupative, as by Writing, doth by Will in Writing amongſt other things bequeath the ſame to *I. S.* for ſuch Eſtate as is ſpecified in a Schedule thereunto annexed, and then the Deviſor dyeth without annexing any Schedule to the ſaid Will, or other Declaration of the certainty of the ſtate; this Deviſe is void in Law. Now it is to be conſidered, that albeit the intent of the Deviſor be certain in all things, that nevertheleſs though it be unlawful, the ſame will be of no force. And therefore, it is alſo needful to diſcern, where and in what caſe the intent of the Deviſor is unlawful, and where not: and the intent of the Deviſor is unlawful, when it is

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ſo repugnant to the Rules of the Law, as that by any Counſel learned in the Law, it could take no effect by Conveyance executed in his life-time; as for example, a Deviſe of a naked Right, or poſſibility of a Remainder to depend upon an Eſtate in Fee-ſimple thereby bequeathed, is ſaid to be unlawful; for as no ſuch Remainder could be bequeathed, *id eſt*, conveyed by any Act executed in a mans life, ſo alſo no bare right could be conveyed by the like Act executed in his life to any perſon, other than ſuch as were ſeiſed, or to be ſeiſed of the Free-hold of the ſame Lands at the inſtant of the execution of the Conveyance, and that only by way of the extinguiſhment. And hereupon it followeth, that a man having right to Lands deviſable, being by defeiſable Title in the poſſeſſion of *I. S.* cannot deviſe the ſame by Will to *I. D.* So alſo the Lord, of whom the Lands deviſable are immediately holden by Knights ſervice, cannot deviſe his poſſibility of Eſchears or Wardſhip, that may thereof accrew to him, when his Tenant ſhall happen to dye without Heirs; or the poſſibility of Wards, when the Heirs ſhall be within age.

Concerning an intent impoſſible, we

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term that an impoſſible intent, which by no probable and common poſſibility can be accompliſhed: and of ſuch impoſſible intents, there are three ſorts: 1. Impoſſible both at the time of the making of the Will, and alſo at the Death of the Deviſor: 2. Impoſſible only at the time of the Deviſe, and not at the time of the deceaſe of the Teſtator. 3. Impoſſible at the time of the making of the Deviſe. And as to the firſt ſort of Lands deviſable by Will, bequeathed to the Heirs of *S.* who was attainted of Felony or Treaſon, unreverſed at the time of the Deviſe, or death of the Deviſor; or if in time of Romiſh Religion, ſuch Deviſe was made to one that was a Monk, being not deraigned at the time of the Deviſe, or death of the Teſtator; or if the ſame be deviſed to the Heirs of *I. D.* who was then dead without Heir; or to a Corporation that had no being at the time of the Will, or death of the Teſtator: or if a man by his Will do deviſe a certain houſe in a Borough, wherein at the time of his deviſe and death he had nothing: Or if Lands be deviſed to the Executors of *I. S.* who died inteſtate; in every of theſe caſes, the intent of the Deviſor was impoſſible, both at the time of

the deviſe and death of the Deviſor; and for ſuch impoſſibility, the deviſes are abſolutely void.

Concerning the ſecond ſort, if Lands were deviſed to a Monk, who at the time of the death of the Teſtator was deraigned, or to the Heirs of one that is attainted of, *&c.* which is afterwards reverſed before his death; or to a Corporation that hath a being at the time of his death, but not created at the time of the Deviſe: in theſe caſes, the intent of the Deviſor was only impoſſible at the time of the Deviſe, but not at the time of Deceaſe of the Teſtator. And yet I take the Law, that thoſe deviſes be alſo void: *Nam quod ab initio non valet, id tractu temporis non convaleſcit.*

The ſixth Obſervation is, that the Deviſe be not countermanded; for it is a clear caſe, that it is countermandable at the pleaſure of the Deviſor, or thereby the Deviſe will be of no force in Law. And it is to be noted, that there are two kinds of Countermands, the one is a Countermand in Deed, the other a Countermand in Law. A Countermand in Deed, is when a Teſtator doth expreſly revoke his Will formerly made, or any part

part thereof; and this Countermand by word is of no leſs force than if it were by writing; for albeit the Will contain, amongſt other things, Deviſes of Lands, be it in Writing, as an effectual part thereof, in caſe where the Cuſtom or Law doth ſo require it: yet nevertheleſs, an expreſs Countermand by word of the Will, or of any Deviſe of Lands therein compriſed, will be ſufficient in Law to controul the ſame, as it appeareth by *Ketts* Caſe, 14 *El.* Alſo, if after the making of the Will, the Teſtator doth cauſe a Deviſe therein made to one man to be quite ſtricken out; this is alſo a Countermand in Deed of that Deviſe, and the Will ſtandeth good for all the reſidue. A Countermand which in Law, is that which neither by Word nor Deed is expreſſed, but only in thoſe other Acts implyed. As for example, the making of another Will doth imply a revocation of the former, and therefore it is a Countermand in Law thereof. So likewiſe if Lands be deviſed by Will, and afterwards the Deviſor infeoffeth a ſtranger in Fee thereof, this Feoffment doth imply a Revocation of the Deviſe of the Land, and therefore it is in that part a Countermand in Law, albeit

he afterwards repurchaſeth the ſame, 44 *Ed.*3. 33. And although Lands deviſable by Cuſtom may be executed by a Writ of *ex grm. querela*, yet if there be no ſpecial Cuſtom to the contrary, the Deviſee may (if he pleaſe) execute the ſame by Entry, as it appeareth by 35 *Aſſs. plit.* 12. 40 *Aſſs. p.* 2.27 *Aſſs. p.* 60. And in every ſuch caſe the poſſeſſion in Law of the thing deviſed, immediately after the deceaſe of the Teſtator, no leſs caſt upon the Deviſee, than it ſhould have been caſt upon the Heir, if no Deviſe had been thereof made, as appeareth *Brooks Title deviſe*, 490.

Conveyances by Will, by force of the Statute of 32 *and* 34 *H.* 8.

ALthough Lands and Tenements, wherein a man had any greater Eſtate than for years, were not deviſable by the Common-Law; yet until the making of the Statute 27 *H.* 8. *cap.* 10. *de uſibus in poſſeſſionem transferendis*, men did commonly put their Lands in uſe; (*viz.*) they did enfeoff others in Fee, to the uſe of themſelves and their Heirs, to the end that they might deviſe the ſame uſe; and by force thereof, after the deceaſe of

of the Teſtator, the Feoffees did at the requeſt of ſuch Deviſee, make and execute to them an Eſtate in the Land according to the uſe deviſed: and if the Feoffees did refuſe ſo to do, the Deviſee might thereunto compell him by ſuit in the *Chancery*. And ſo by ſuch ſubtil invention, the Deviſee obtained the effect of a Deviſe of the ſame Lands or Tenements, which were not then deviſable by Law.

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